

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/1. NATURE, CLASSIFICATION AND PRINCIPLES OF ESTOPPEL/951. Meaning of 'estoppel'.

## ESTOPPEL (

### 1. NATURE, CLASSIFICATION AND PRINCIPLES OF ESTOPPEL

#### 951. Meaning of 'estoppel'.

'Estoppel' has been described as a principle of justice and of equity which prevents a person who has led another to believe in a particular state of affairs from going back on the words or conduct which led to that belief when it would be unjust or inequitable (unconscionable) for him to do so<sup>1</sup>. The person making the statement, promise or assurance is said to be estopped from denying or going back on it; 'estopped' means 'stopped'<sup>2</sup>.

The doctrine of estoppel has developed in a number of separate areas, both common law and equitable, as described below<sup>3</sup>. Estoppel by record, although included in the estoppels discussed in this title, is more properly regarded as part of the law of evidence<sup>4</sup>; other estoppels have been described as rules of evidence<sup>5</sup> but, with the possible exception of estoppel by deed<sup>6</sup>, are more correctly viewed as substantive rules of law<sup>7</sup>. The extent to which estoppel, with the exclusion of estoppel by record, can be viewed as one general principle or area of law is uncertain<sup>8</sup> but it has been described as one of the most flexible and useful doctrines in the armoury of the law<sup>9</sup>. With the exception of proprietary estoppel<sup>10</sup>, estoppel cannot be used as a cause of action<sup>11</sup>, but it may ensure the success of a cause of action by preventing a party from alleging or proving in legal proceedings that a fact is otherwise than it has been made to appear.

1 See *Moorgate Mercantile Co Ltd v Twitchings*[1976] QB 225 at 241, [1975] 3 All ER 314 at 323, CA, per Lord Denning MR; revsd on another point [1977] AC 890, [1976] 2 All ER 641, HL.

2 *McIlkenny v Chief Constable of West Midlands Police Force*[1980] QB 283 at 316, [1980] 2 All ER 227 at 235, CA, per Lord Denning MR; affd sub nom *Hunter v Chief Constable of West Midlands Police*[1982] AC 529, [1981] 3 All ER 727, HL. 'Estoppel is when one is concluded and forbidden in law to speak against his own act or deed, yea, though it be to say the truth': *Termes de la Ley*, Estoppel (cited in *Ashpitel v Bryan* (1863) 3 B & S 474 at 489; *H v H*[1928] P 206 at 214); *Simm v Anglo-American Telegraph Co, Anglo-American Telegraph Co v Spurling*(1879) 5 QBD 188 at 202, CA, per Bramwell LJ; *Re Sugden's Trusts, Sugden v Walker*[1917] 1 Ch 510 at 516 per Neville J; on appeal [1917] 2 Ch 92 at 97, CA, per Bankes LJ. The term is thought to be derived from the old French term 'estoupail' meaning a bung or cork: see Co Litt 352a.

3 See PARA 952 et seq post.

4 See eg *K v P (Children Act proceedings: estoppel)*[1995] 2 FCR 457, [1995] 1 FLR 248; and CIVIL PROCEDURE vol 12 (2009) PARAS 1168-1173. As to estoppel by record see PARAS 953, 964 et seq post. Cf, however, *Mills v Cooper*[1967] 2 QB 459 at 469, [1967] 2 All ER 100 at 110, DC, per Diplock LJ ('Whatever may be said of other rules of law to which the label of "estoppel" is attached, "issue estoppel" is not a rule of evidence').

5 'Estoppel is only a rule of evidence; you cannot found an action upon estoppel': *Low v Bouverie*[1891] 3 Ch 82 at 105, CA, per Bowen LJ and at 101 per Lindley LJ to same effect, cited by Hodson LJ in *Lyle-Meller v A Lewis & Co (Westminster) Ltd*[1956] 1 All ER 247 at 252-253, [1956] 1 WLR 29 at 39-40, CA; *Re Ottos Kopje Diamond Mines Ltd*[1893] 1 Ch 618 at 628, CA per Bowen LJ; *Harriman v Harriman*[1909] P 123 at 144, CA, per Farwell LJ; *Brandon v Dowager Baroness Michelham* (1919) 35 TLR 617; *Re Sugden's Trusts, Sugden v Walker*[1917] 1 Ch 510 (on appeal [1917] 2 Ch 92, CA); *H v H*[1928] P 206; cf *Dickson v Reuter's Telegram Co* (1877) 3 CPD 1, CA; *Combe v Combe*[1951] 2 KB 215, [1951] 1 All ER 767, CA. Proprietary estoppel may, however, now be a cause of action with regard to an interest in land: see PARA 1089 post. The jurisdiction of a court of limited jurisdiction

cannot be enlarged by any form of estoppel: *Standing v Eastwood & Co* (1912) 106 LT 477 at 478, CA; *Dutton v Sneyd Bycars Co Ltd*[1920] 1 KB 414 at 420, CA; *Simpson v Crowle*[1921] 3 KB 243 at 253.

6 As to estoppel by deed see PARAS 954, 1011 et seq post; and see CIVIL PROCEDURE vol 11 (2009) PARAS 964.

7 *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd*[1947] AC 46 at 56, PC.

8 See *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd*[1982] QB 84 at 122, [1981] 3 All ER 577 at 584, CA, per Lord Denning MR; and see *First National Bank plc v Thompson*[1996] Ch 231 at 235, [1996] 1 All ER 140 at 144, CA, per Millett LJ; *Scottish Equitable plc v Derby*[2001] EWCA Civ 369 at [48], [2001] 3 All ER 818, [2001] 2 All ER (Comm) 274 per Robert Walker LJ. For a suggested new terminology dividing estoppels, other than estoppel by record, into formal estoppels and reliance-based estoppels see Cooke *The Modern Law of Estoppel* (OUP, 2000) p 69. For a contrary view see eg Wilken and Villiers *Law of Waiver, Variation and Estoppel* (2nd Edn, 2002).

9 *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd*[1982] QB 84 at 122, [1981] 3 All ER 577 at 584, CA, per Lord Denning MR.

10 As to proprietary estoppel see PARA 1089 et seq post.

11 See eg *Moorgate Mercantile Co Ltd v Twitchings*[1976] QB 225 at 241, [1975] 3 All ER 314 at 323, CA, per Lord Denning MR.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/1. NATURE, CLASSIFICATION AND PRINCIPLES OF ESTOPPEL/952. Kinds of estoppel.

## 952. Kinds of estoppel.

Coke identified three kinds of estoppel at common law<sup>1</sup>:

- 1 (1) estoppel by record or quasi by record<sup>2</sup>;
- 2 (2) estoppel by deed<sup>3</sup>; and
- 3 (3) estoppel in pais<sup>4</sup>.

Common law estoppel by representation has since developed from estoppel in pais<sup>5</sup> and in equity two further kinds of estoppel by representation have developed, promissory estoppel<sup>6</sup> and proprietary estoppel<sup>7</sup>.

Estoppel by record, although discussed in this title, is more properly regarded as part of the law of evidence<sup>8</sup> although there are judicial dicta to the contrary<sup>9</sup>. The other kinds of estoppel may now be more conveniently categorised as:

- 4 (a) formal estoppels, comprising estoppel by deed and estoppel in pais (or 'estoppel as to title' otherwise than as part of estoppel by deed);
- 5 (b) estoppel by representation (or 'reliance-based' estoppel) which may be common law estoppel by representation, promissory estoppel or proprietary estoppel<sup>10</sup>.

1 Co Litt 352a.

2 See PARAS 953, 964 et seq post. As to cause of action estoppel see PARAS 977-979 post; and as to issue estoppel see PARA 980 et seq post.

3 See PARAS 954, 1011 et seq post.

4 See PARAS 955, 1043 et seq post. As to the maxim that one may not approbate and reprobate (not to be confused with the equitable doctrine of election), and estoppel arising from that principle, see PARA 962 post.

5 See PARAS 956-957, 1076 et seq post.

6 See PARAS 958, 1082 et seq post.

7 See PARAS 959, 1089 et seq post.

8 See PARA 951 the text and note 4 ante.

9 See eg *Mills v Cooper* [1967] 2 QB 459 at 469, [1967] 2 All ER 100 at 110, DC, per Diplock LJ.

10 As to the desirability or otherwise of categorising the different varieties of estoppel see eg *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274 at [36], [2002] 1 All ER (Comm) 737 per Sir Andrew Morritt V-C and the authorities there cited.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/1. NATURE, CLASSIFICATION AND PRINCIPLES OF ESTOPPEL/953. Estoppel by record.

### 953. Estoppel by record.

Estoppel by record<sup>1</sup>, also known as estoppel per rem judicatam, arises:

- 6 (1) in some cases<sup>2</sup> where an issue of fact affecting the status of a person or thing has been necessarily<sup>3</sup> determined in a final manner as a substantive part<sup>4</sup> of a judgment in rem<sup>5</sup> of a tribunal having jurisdiction to determine that status (rather than the particular interest in the issue held by a party to the litigation); the estoppel then operates when the same issue comes directly in question in subsequent civil or criminal proceedings<sup>6</sup> between any parties whatever;
- 7 (2) where a legal claim has been judicially determined in a final manner between the parties by a tribunal having jurisdiction, concurrent or exclusive, in the matter, and the same issue comes directly in question in subsequent proceedings between the same parties (this is usually known as cause of action estoppel)<sup>7</sup>;
- 8 (3) where an issue has been judicially determined as a necessary step in reaching a judgment and the issue arises in subsequent proceedings between the same parties<sup>8</sup> (this is usually known as issue estoppel)<sup>9</sup>.

The line between cause of action estoppel and issue estoppel is not always clear cut. The principles have been explained in a recent Court of Appeal decision<sup>10</sup> as follows. If a claim has been explicitly determined in previous concluded proceedings between the same parties, that claim cannot be raised again, other than on an appeal, unless there is fraud or collusion<sup>11</sup>. If a necessary element of a claim has been explicitly determined in previous concluded proceedings between the same parties, that issue cannot be raised again, if, as is likely but not inevitable, it would be an abuse to raise that issue again; this may also extend to an implicitly necessary element of the previous determination. The previous determination may include a settlement<sup>12</sup>.

Cause of action estoppel and issue estoppel may be compared with the concept of abuse of process<sup>13</sup> and are sometimes regarded as particular forms of this wider concept<sup>14</sup>. They are to be distinguished from the evidential rule known as the rule in *Hollington v Hewthorn*<sup>15</sup> and also from the statutory rules relating to the admissibility in evidence of previous convictions<sup>16</sup> and of previous findings of adultery and paternity<sup>17</sup>.

1 Where the earlier decision is that of a court of record, the resulting estoppel is said to be 'by record'; where it is that of any other tribunal, whether constituted by agreement of the parties or otherwise, the estoppel was formerly said to be 'quasi by record'. The fact that the earlier decision or determination was made by an inferior court does not prevent estoppel by record arising. As to courts of record and inferior courts see COURTS vol 10 (Reissue) PARAS 308-309; and as to the courts and tribunals not strictly courts of record whose decisions may nevertheless give rise to an estoppel see PARA 987 et seq post. Jurisdiction is essential: see PARA 965 post.

2 See *Hill v Clifford*, *Clifford v Timms*, *Clifford v Phillips* [1907] 2 Ch 236 at 250, CA, per Gorell Barnes P.

3 *R v Hartington Middle Quarter Inhabitants* (1855) 4 E & B 780; *Concha v Concha* (1886) 11 App Cas 541, HL, affg *De Mora v Concha* (1885) 29 ChD 268, CA. *R v Hartington Middle Quarter Inhabitants* supra was doubted by Lord Selborne LC in *R v Hutchings* (1881) 6 QBD 300 at 303, CA, but it appears to be well established: see *Wakefield Corp v Cooke* [1903] 1 KB 417 at 424, CA; affd [1904] AC 31, HL.

4 *R v Hartington Middle Quarter Inhabitants* (1855) 4 E & B 780; *Hobbs v Henning* (1865) 17 CBNS 791 (foreign judgment in rem). As to the conclusiveness of foreign judgments see PARA 992 post.

5 For the meaning of 'judgment in rem' see PARA 972 post.

6 *Armstrong v Whitfield* [1974] QB 16, [1973] 2 All ER 546, DC (a decision in civil proceedings that a lane was subject to a public right of way estopped a party charged in later criminal proceedings with wilfully obstructing a highway from calling evidence to show that there was no public right of way); cf *Murphy v Culhane* [1977] QB 94, [1976] 3 All ER 533, CA (a conviction for manslaughter did not prevent the defences of *ex turpi causa non oritur actio* and *volenti non fit injuria* being raised in a subsequent civil action brought by the widow of the deceased).

7 See PARAS 964, 976, 979 post.

8 *Duchess of Kingston's Case* (1776) 2 Smith LC (13th Edn) 644 at 645 per De Grey CJ; *Mackintosh v Smith and Lowe* (1865) 4 Macq 913 at 924, HL per Lord Chelmsford.

9 See PARA 980 et seq post.

10 See *Specialist Group International Ltd v Deakin* [2001] EWCA Civ 777, [2001] All ER (D) 287 (May).

11 As to judgments obtained by fraud see PARA 1007 post.

12 See *Specialist Group International Ltd v Deakin* [2001] EWCA Civ 777 at [23], [2001] All ER (D) 287 (May) per May LJ; and cf at [10] per Aldous LJ, where the terms 'cause of action finality' and 'issue finality' are suggested for 'cause of action estoppel' and 'issue estoppel'.

13 If a claim or issue has not been determined in previous concluded proceedings between the same parties, there may nevertheless be circumstances in which, as a matter of public and private interest on a broad merits-based procedural judgment, it would be an abuse for a party to raise that claim or issue: see *Specialist Group International Ltd v Deakin* [2001] EWCA Civ 777 at [23], [2001] All ER (D) 287 (May) per May LJ.

14 See *Specialist Group International Ltd v Deakin* [2001] EWCA Civ 777 at [10], [2001] All ER (D) 287 (May) per Aldous LJ. As to striking out proceedings for abuse of process see CIVIL PROCEDURE vol 11 (2009) PARAS 252, 520; and as to staying proceedings for abuse of process see CIVIL PROCEDURE vol 11 (2009) PARA 534. See also the discussion of abuse of process and issue estoppel at para 984 note 4 post.

15 Is the rule that a judgment is conclusive against all persons of the existence of the state of things which it actually affects, when the existence of that state is a fact in issue: see *Hollington v F Hewthorn & Co Ltd* [1943] KB 587 at 596, [1943] 2 All ER 35 at 41, CA, per Goddard LJ; and CIVIL PROCEDURE vol 11 (2009) PARA 1098.

16 See the Civil Evidence Act 1968 ss 11, 13 (as amended); and CIVIL PROCEDURE vol 12 (2009) PARAS 1208-1209; the Police and Criminal Evidence Act 1984 s 74; and CRIMINAL LAW, EVIDENCE AND PROCEDURE vol 11(3) (2006 Reissue) PARA 1498.

17 See the Civil Evidence Act 1968 s 12 (as amended); and CIVIL PROCEDURE vol 12 (2009) PARA 1208.

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#### **954. Estoppel by deed.**

Where there is a statement of fact in a deed<sup>1</sup> made between parties, an estoppel results, and is called 'estoppel by deed'<sup>2</sup>. If upon the true construction of the deed the statement is that of both or all the parties, the estoppel is binding on each party; if otherwise, it is binding only on the party making it<sup>3</sup>. It seems that an estoppel also arises upon a deed executed by one party only, the mode of its execution being equally solemn with that of a deed made inter partes<sup>4</sup>.

Moreover, when a legal estate is created by deed, the parties to the deed are estopped from denying the existence of that estate (typically a lease or mortgage) and from denying the consequent status of the other party, for example as his landlord or tenant<sup>5</sup>.

1 As to the formalities of execution of a deed see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 27 et seq. Any rule of law which required a seal for the valid execution of an instrument as a deed by an individual has, except in relation to a corporation sole, been abolished: see the Law of Property (Miscellaneous Provisions) Act 1989 s 1(1)(b), (10) and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 7, 32.

2 Co Litt 352a; explained in 2 Smith LC (13th Edn) 659; *Rudd v Bowles* [1912] 2 Ch 60; and see PARA 1014 post.

3 See PARA 1020 post.

4 See PARA 1014 note 1 post.

5 See PARA 1029 et seq post.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/1. NATURE, CLASSIFICATION AND PRINCIPLES OF ESTOPPEL/955. Estoppel in pais.

### **955. Estoppel in pais.**

The term 'estoppel in pais' or 'pais' was used by Coke to refer to a number of public acts establishing certain relations of parties<sup>1</sup>.

The acts in pais to which Coke referred as binding parties by way of estoppel were few, and were acts of notoriety not less formal and solemn than a deed, for example livery, entry and acceptance of an estate<sup>2</sup>. Thus estoppel in pais is similar to the estoppel that arises from the creation of a legal estate by deed<sup>3</sup>, since, similarly, it prevents the denial of a relationship.

1 As to the origins of the term 'in pais' see Co Litt 352a. 'Estoppel in pais' has been used to describe what is now referred to as 'common law estoppel by representation'. As to common law estoppel by representation see PARAS 957, 1076 et seq post.

2 *Lyon v Reed* (1844) 13 M & W 285 at 309, citing Co Litt 352a; *Doe d Nepean v Budden* (1822) 5 B & Ald 626 (copyholder having done fealty could not dispute lord's title to manor); cf *Goodtitle d Faulkner v Morse* (1789) 3 Term Rep 365; *Morse v Faulkner* (1792) 1 Anst 11. To this class of matter in pais must apparently be referred the registry, flag, and pass of a ship, which raise a presumption of nationality against which the owner is not permitted to aver: *The Laura* (1865) 3 Moo PCCNS 181.

3 As to estoppel arising from the creation of a legal estate by deed see PARA 1029 et seq post; and as to estoppel in pais see PARA 1043 et seq post.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/1. NATURE, CLASSIFICATION AND PRINCIPLES OF ESTOPPEL/956. Development of reliance-based estoppel; in general.

### **956. Development of reliance-based estoppel; in general.**

Estoppel in pais, as described in the previous paragraph, was later developed by the courts to accommodate what is now described as estoppel by representation<sup>1</sup>. An estoppel by representation arises when there has been a representation made by one person on which another person relies and on which he acts so as to alter his own previous position<sup>2</sup>; thus it may be described as 'reliance-based' estoppel<sup>3</sup>. In common law estoppel by representation, the representation relied on is a straightforward statement of fact<sup>4</sup>; in promissory estoppel, which was an equitable development from common law estoppel by representation, the representation is a promise not to enforce the representor's rights<sup>5</sup>. A further category of equitable reliance-based estoppel is proprietary estoppel, where the representation consists of a promise of an interest in land<sup>6</sup>. The restriction of equitable estoppel to certain defined categories has been judicially criticised<sup>7</sup> and principles derived from proprietary estoppel have been used in the context of commercial obligations<sup>8</sup> but it would seem that significant distinctions between promissory and proprietary estoppel remain<sup>9</sup>.

1 See eg *First National Bank plc v Thompson* [1996] Ch 231 at 235, [1996] 1 All ER 140 at 144, CA, per Millett LJ. For an account of the historical development of estoppel by representation see Cooke *The Modern Law of Estoppel* (OUP, 2000) Ch 3 (pp 16-53); see also the authorities cited at note 1 on p 16 of that chapter.

2 See eg *Pickard v Sears* (1837) 6 Ad & El 469 at 474 per Lord Denman CJ; *Freeman v Cooke* (1848) 2 Exch 654 at 663 per Parke B; *Heane v Rogers* (1829) 9 B & C 577 at 586; and see PARA 957 post.

3 This is the terminology suggested in Cooke *The Modern Law of Estoppel* (OUP, 2000) (see p 69); however, in this work the term 'estoppel by representation' is retained.

4 See PARAS 957, 1077-1078 post.

5 See PARAS 958, 1083 post.

6 See PARAS 959, 1090 post.

7 See eg *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84 at 103, [1981] 1 All ER 923 at 935, per Robert Goff J; (it 'cannot be right to restrict equitable estoppel to certain defined categories') (affd [1982] QB 84, [1982] 3 All ER 577, CA); *Crabb v Arun District Council* [1976] Ch 179 at 183, [1975] 3 All ER 865 at 875, CA per Scarman LJ ('I do not find helpful the distinction between promissory and proprietary estoppel ... I do not think that, in solving the particular problem raised by a particular case, putting the law into categories is of the slightest assistance').

8 See *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84, [1982] 3 All ER 577, CA; and PARA 1089 post.

9 Only in the case of an interest in land can proprietary estoppel be used as a cause of action: see PARA 1089 post.



Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/1. NATURE, CLASSIFICATION AND PRINCIPLES OF ESTOPPEL/957. Common law estoppel by representation.

### 957. Common law estoppel by representation.

Where a person has by words or conduct<sup>1</sup> made to another a clear and unequivocal<sup>2</sup> representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon<sup>3</sup>, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position, an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be<sup>4</sup>.

The conduct relied upon as amounting to a representation may be negligence<sup>5</sup>. This can give rise to an estoppel only where there is a duty to the person complaining to use due care; and it is further necessary that the negligence should be in the transaction itself which is in dispute, calculated to lead, and in fact leading, as its 'real'<sup>6</sup> cause to the belief created<sup>7</sup>.

1 The conduct may be silence or inactivity when under a duty to speak or act: see eg *Hopgood v Brown* [1955] 1 All ER 550 at 559, [1955] 1 WLR 213 at 223, CA; and see PARA 1059 post.

2 See *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741 at 768, [1972] 2 All ER 271 at 291, HL, per Lord Cross of Chelsea; *Peyman v Lanjani* [1985] Ch 457, [1984] 3 All ER 703, CA; *Allied Marine Transport Ltd v Vale Do Rio Doce Navegacao SA, The Leonidas D* [1985] 2 All ER 796, [1985] 1 WLR 925, CA.

3 See PARAS 1069-1070 post.

4 *Carr v London and North Western Rly Co* (1875) LR 10 CP 307 at 316-317 per Brett J; cf *Greenwood v Martins Bank Ltd* [1933] AC 51 at 57, HL, per Lord Tomlin. The statement of law contained in the text in a previous edition of this work was approved by Humphreys J in *Re the Local Government Superannuation Acts 1937 and 1939, Algar v Middlesex County Council* [1945] 2 All ER 243 at 250, DC. The essential elements of estoppel by representation which are summarised in the text are collected from *Pickard v Sears* (1837) 6 Ad & El 469; *Freeman v Cooke* (1848) 2 Exch 654; *Swan v North British Australasian Co* (1862) 7 H & N 603 (first part of the rule laid down by Wilde B at 633); (on appeal (1863) 2 H & C 175, Ex Ch); and *Cornish v Abington* (1859) 4 H & N 549 at 556. See also *Cairncross v Lorimer* (1860) 3 Macq 827 at 829, HL, per Lord Campbell LC, cited with approval in *Re William Porter & Co Ltd* [1937] 2 All ER 361 at 363 per Simonds J; and in *Hopgood v Brown* [1955] 1 All ER 550 at 562, [1955] 1 WLR 213 at 229, CA, per Jenkins LJ; *Smith v Hughes* (1871) LR 6 QB 597 at 607 per Blackburn J; *Dunn v Shanks* [1932] NI 66, CA, applying the following simple definition of the doctrine laid down in *Maclaine v Gatty* [1921] 1 AC 376 at 386, HL, by Lord Birkenhead LC (where A has by his words or conduct justified B in believing that a certain state of facts exists, and B has acted upon such belief to his prejudice, A is not permitted to affirm against B that a different state of facts existed at the same time); *Sullivan v Constable* (1932) 48 TLR 369, CA; *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555, [1961] 2 All ER 545 (execution of a contract, which omits or varies a term that the first party believed to be included, by the second party with knowledge of the first party's mistake, estops the second party from resisting rectification on the ground that the mistake was unilateral). See also the statement cited with approval by Sir Raymond Evershed MR in *Hopgood v Brown* supra at 559 and at 223-224, CA; and *St Marylebone Property Co Ltd v Fairweather* [1962] 1 QB 498 at 508, [1961] 3 All ER 560 at 563, CA, per Holroyd Pearce LJ; affd sub nom *Fairweather v St Marylebone Property Co Ltd* [1963] AC 510, [1962] 2 All ER 288, HL (no estoppel against third party so as to deprive him of proprietary rights granted to him by the party making the representation).

5 See PARA 1061 et seq post.

6 *Seton v Lafone* (1887) 19 QBD 68 at 71, CA, per Lord Esher MR, reaffirming with the substitution of 'real' for 'proximate' the fourth proposition in *Carr v London and North Western Rly Co* (1875) LR 10 CP 307.

7 *Carr v London and North Western Rly Co* (1875) LR 10 CP 307 at 318, founded on the second part of Wilde B's rule in *Swan v North British Australasian Co* (1862) 7 H & N 603, with Blackburn J's correction on appeal (1863) 2 H & C 175 at 182, Ex Ch, and approved in *Coventry v Great Eastern Rly Co* (1883) 11 QBD 776, CA; *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777 at 836, HL.



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### 958. Promissory estoppel.

Promissory estoppel is an extension by equity of common law estoppel by representation<sup>1</sup>. The principle of promissory estoppel is that, when one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but must accept their legal relations subject to the qualification which he himself has so introduced<sup>2</sup>. This principle was developed in a line of authority from 1877 onwards<sup>3</sup> but first clearly enunciated in 1944<sup>4</sup>. The term 'promissory estoppel' was not, however, used in the 1944 judgment<sup>5</sup> generally taken as the basis<sup>6</sup> of the doctrine<sup>7</sup>.

Promissory estoppel may prevent a party to a contract from going back on a concession he has made to the other party and so may modify contracts in the sense of suspending or even extinguishing contractual rights<sup>8</sup> but cannot stand alone as giving a cause of action in itself<sup>9</sup> and thus has not made any general inroads into the doctrine of consideration<sup>10</sup>.

1 As to common law estoppel by representation see PARA 957 ante. For a discussion of the development of promissory estoppel see Cooke *The Modern Law of Estoppel* (OUP, 2000) pp 32-42.

2 *Combe v Combe* [1951] 2 KB 215 at 220, [1951] 1 All ER 767 at 770, CA, per Denning LJ; and see PARA 1082 post.

3 See eg *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439 at 448, HL, per Lord Cairns LC, interpreted in *Birmingham and District Land Co v London and North Western Rly Co* (1888) 40 ChD 268 at 286, CA per Bowen LJ; and see *Combe v Combe* [1951] 2 KB 215 at 219, [1951] 1 All ER 767 at 769, CA per Denning LJ.

4 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 at 134, [1956] 1 All ER 256n at 258n per Denning J.

5 Ie *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n. Promissory estoppel may be described as the 'High Trees principle' or 'the High Trees doctrine'.

6 The comments of Denning J in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130 at 134, [1956] 1 All ER 256n at 258n have since been regarded as obiter dicta: see eg *Slough Estates Ltd v Slough Borough Council (No 2)* (1967) 19 P & CR 326 at 362 per Megarry J; affd without discussion of this point [1969] 2 Ch 305, [1969] 2 All ER 988, CA, and, on different grounds, [1971] AC 958, [1970] 2 All ER 216, HL.

7 For early examples of the use of the term 'promissory estoppel' see *Dean v Bruce* [1952] 1 KB 11 at 14, [1951] 2 All ER 926 at 928, CA, per Denning LJ (referring to his judgment in *Combe v Combe* [1951] 2 KB 215, [1951] 1 All ER 767); *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129, [1958] 2 All ER 733.

8 See PARA 1087 post.

9 *Combe v Combe* [1951] 2 KB 215 at 220, [1951] 1 All ER 767 at 770, CA, per Denning LJ and at 224 and 772 per Birkett LJ; and see PARA 1084 post.

10 See PARA 1084 post. As to the doctrine of consideration see generally CONTRACT vol 9(1) (Reissue) PARA 727 et seq.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/1. NATURE, CLASSIFICATION AND PRINCIPLES OF ESTOPPEL/959. Proprietary estoppel.

### **959. Proprietary estoppel.**

Also developed from common law estoppel by representation<sup>1</sup>, proprietary estoppel has been described as follows. The owner of land, A, in some way leads or allows the claimant, B, to believe that he has or can expect some kind of right or interest over A's land. To A's knowledge, B acts to his detriment in that belief. A then refuses B the anticipated right or interest in circumstances that make that refusal unconscionable. In those circumstances, an equity arises in B's favour. This gives B the right to go to court and seek relief. The court has a very wide discretion as to how it will give effect to this equity<sup>2</sup>.

Principles derived from proprietary estoppel have been used in commercial contexts not involving land<sup>3</sup> but it remains the case that only where the promise of an interest in land has been made and relied on can proprietary estoppel constitute a cause of action in itself<sup>4</sup>.

1 As to common law estoppel by representation see PARA 957 ante. For a discussion of the development of proprietary estoppel see Cooke *The Modern Law of Estoppel* (OUP, 2000) pp 42-53; Pawlowski *The Doctrine of Proprietary Estoppel* (Sweet and Maxwell, 1996); Spence *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (Hart Publishing, 1999).

2 See *Land Registration for the Twenty-First Century, a Conveyancing Revolution* (Law Com no 271) (2001) PARA 5.29, citing the definition of proprietary estoppel given by a joint working group of the Law Commission and HM Land Registry in *Land Registration for the Twenty-First Century, a Consultative Document* (Law Com no 254) (1998) PARA 3.34.

3 See PARA 956 note 8 ante.

4 See PARA 1089 post.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/1. NATURE, CLASSIFICATION AND PRINCIPLES OF ESTOPPEL/960. Estoppel and statute.

## 960. Estoppel and statute.

There is no absolute rule as to whether estoppel may, or may not, be used to circumvent a statutory provision<sup>1</sup> although the principle that a party cannot set up an estoppel in the face of a statute has been described as a principle that appears in our law in many forms<sup>2</sup>. A clear public policy underlying a statute, such as the need to protect vulnerable persons dealing with moneylenders or landlords, may prevent an estoppel from arising<sup>3</sup> but in other instances statutory requirements, for example as to formalities or time limits, may be circumvented by estoppel<sup>4</sup>.

The well-established principle that a statutory authority may not be prevented by estoppel from carrying out its statutory powers and duties or obliged or enabled, as a result of an estoppel, to act beyond its statutory powers, is discussed below<sup>5</sup>. It is also well-established that the doctrine of estoppel may not be invoked to give a court or tribunal a jurisdiction which is denied to it by statute<sup>6</sup>; nor may it be used to oust the court's statutory jurisdiction under an enactment which precludes the parties from contracting out of its provisions<sup>7</sup>. It is, however, possible to be estopped from denying a factor decisive of whether or not a person falls within a statutory regime<sup>8</sup> and estoppel may be argued in respect of factors not essential to jurisdiction<sup>9</sup>.

With regard to estoppel by record<sup>10</sup>, the court's statutory duty to inquire, so far as it reasonably can, into the truth of any alleged facts when a divorce petition is presented<sup>11</sup> and the court's statutory duties under the Children Act 1989<sup>12</sup> mean that this form of estoppel does not operate according to the ordinary principles in matrimonial and family proceedings<sup>13</sup>.

<sup>1</sup> For a fuller discussion of estoppel and statute see Cooke *The Modern Law of Estoppel* (OUP, 2000) pp 135-150.

<sup>2</sup> *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1015, [1964] 1 All ER 300 at 307-308, PC. Cf *Furniss Withy (Australia) Pty Ltd v Metal Distributors (UK) Ltd, The Amazonia* [1989] 1 Lloyd's Rep 403 at 410 per Gatehouse J (in general, an estoppel can be set up in the face of a foreign statute).

<sup>3</sup> As to the correct test see *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1015-1018, [1964] 1 All ER 300 at 307-309, PC; *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17 at [49], [2003] 2 All ER 615, [2003] 2 WLR 1060 per Lord Walker of Gestingthorpe; *United Dominions Corpn (Jamaica) Ltd v Shoucair* [1969] 1 AC 340 at 349, [1968] 2 All ER 904 at 908, PC; *McGregor Navine (UK) Ltd v British Railways Board* [1986] 1 FTLR 100; and see eg *Chalmers v Pardoe* [1963] 3 All ER 552, [1963] 1 WLR 677, PC (proprietary estoppel not available to claimant because promised licence to occupy land offended provisions of Native Land Trust Ordinance of Fiji, requiring consent of Native Land Trust Board to any such dealing).

See also *Re Stapleford Colliery Co, Barrow's Case* (1880) 14 ChD 432 at 441, CA; *Anctil v Manufacturers' Life Insurance Co* [1899] AC 604, PC; *Bradshaw v McMullan* [1920] 2 IR 412 at 425, HL, per Lord Shaw of Dunfermline ('I do not see my way to sanction the application of this specific plea of *res judicata*, or the more general plea of estoppel, to any transaction which is in plain defiance of statutory injunction'); *Re A Bankruptcy Notice* [1924] 2 Ch 76 at 96-98, CA, per Atkin LJ. Cf the dictum of Ronan LJ in *Bradshaw v McMullan* [1920] 2 IR 47 at 59, CA (on appeal [1920] 2 IR 412, HL) to the effect that a decision that a contract is not void under a certain statute can raise an estoppel by judgment; *Hoare v Adam Smith (London) Ltd* [1938] 4 All ER 283 (estoppel is no answer to the contention that the terms of a contract were inaccurately stated contrary to moneylending statute); *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314 at 324, [1960] 1 WLR 549 at 560-561 per Buckley J (affd on another point [1961] Ch 105, [1961] 1 All ER 90, CA); *H Smith & Co (Orpington) v Sharp* [1959] CLY 2832 (a party cannot be estopped from denying the validity of a notice of increase of rent required by statute). As to the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) see note 4 infra; and PARA 1094 post.

<sup>4</sup> See eg *Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498; *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, CA (proprietary estoppel available to enforce promise to bequeath land, circumventing formal

requirements of Wills Act 1837); *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, [1970] 2 All ER 871, HL (landlord estopped from objecting when tenant's application for new tenancy following statutory notice made too early); *Co-operative Wholesale Society v Chester le Street District Council* (1996) 73 P & CR 111, Lands Tribunal (local authority estopped from objecting that dispute as to compensation for compulsory purchase referred to tribunal out of time); *Actionstrength Ltd (t/a Vital Resources) v International Glass Engineering IN.GL.EN SpA* [2003] UKHL 17, [2003] 2 All ER 615, [2003] 2 WLR 1060 (estoppel not available on the facts to circumvent formal requirements as to guarantees contained in the Statute of Frauds 1677 s 4 (as amended) but no suggestion that ordinary rules of estoppel inapplicable to guarantees); *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35, [2001] 4 All ER 138 (no policy reason why estoppel might not operate to exclude evidence that deed purporting to comply with formalities of the Law of Property (Miscellaneous Provisions) Act 1989 s 1(3) did not in fact so comply); *Hillingdon London Borough Council v ARC Ltd* [2000] 3 EGLR 97, [2000] All ER (D) 820, CA (a party may be estopped in an appropriate case from relying on a limitation defence; no estoppel on the facts of that case); *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n, [1981] 1 All ER 897 (no suggestion that estoppel unavailable to negative operation of Land Charges Act 1925 (repealed); but cf *Beesly v Hallwood Estates* [1960] 2 All ER 314, [1960] 1 WLR 549 (affd [1961] Ch 105, [1961] 1 All ER 190, CA); and see *Lloyd's Bank plc v Carrick* [1996] 4 All ER 630 at 641, 73 P & CR 314 at 325, CA, per Morritt LJ).

In *Godden v Merthyr Tydfil Housing Association* [1997] NPC 1, 74 P & CR D1, CA, it was held that estoppel was unavailable to circumvent the formal requirements of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended) for contracts involving disposition of land; but cf *McAusland v Duncan Lawrie Ltd* [1996] 4 All ER 995 at 1007, [1997] 1 WLR 38 at 50, CA, obiter per Morritt LJ ('Section 2 does not give rise to any illegality if its terms are not observed and the need for an estoppel arises in just those circumstances where there is no enforceable contract. For my part I would not place weight on the contention that an estoppel such as the vendor would advance is impossible as a matter of law but it still has to be made out as a matter of fact') referred to with approval in *Bankers Trust Co v Namdar* [1997] NPC 22, [1997] EGCS 21, CA, per Peter Gibson LJ. See also *Yaxley v Gotts* [2000] Ch 162, [2000] 1 All ER 711, CA; and PARA 1094 post.

A person may be estopped from objecting to the invalidity of a notice which does not comply with statutory formalities: see eg *Mercantile and General Reinsurance Co Ltd v Groves* [1974] QB 43, [1973] 3 All ER 330, CA; *Keepers and Governors of the Free Grammar School of John Lyon v Mayhew* [1997] 1 EGLR 88, [1997] 17 EG 163, CA.

5 See PARA 961 post.

6 See eg *Griffiths v Davies* [1943] KB 618, [1943] 2 All ER 209, CA; *J and F Stone Lighting and Radio Ltd v Levitt* [1947] AC 209, [1946] 2 All ER 653, HL; *Welch v Nagy* [1950] 1 KB 455, [1949] 2 All ER 868, CA (all decided under the Rent Acts); *Secretary of State for Employment v Globe Elastic Thread Co Ltd* [1980] AC 506, [1989] 2 All ER 1077, HL (even if estoppel arises, which it did not on the facts, it cannot confer on a tribunal a jurisdiction beyond that given by the relevant statute). Cf, however, *Daejan Properties Ltd v Mahoney* (1998) 28 HLR 498, [1995] 2 EGLR 75, CA (appellant could not have become a statutory tenant by estoppel because Parliament has clearly prescribed the way in which a statutory tenancy can arise or be transmitted; however the landlords had estopped themselves from denying that the appellant and her mother would be treated by them as if they were joint statutory tenants and were therefore estopped from denying that the appellant was entitled to be treated as a statutory tenant).

If it is contended that a tribunal has exceeded the jurisdiction conferred upon it, rather than that it lacks any jurisdiction at all, and the response is that it is too late so to contend, the issue is one of waiver rather than estoppel: *R Durnell & Sons Ltd v Kaduna Ltd* [2003] EWHC 517 (TCC), [2003] All ER (D) 281 (Mar). As to waiver see EQUITY vol 16(2) (Reissue) PARA 907.

7 *Solle v Butcher* [1950] 1 KB 671, [1949] 2 All ER 1107, CA (decided under the Rent Acts); *Keen v Holland* [1984] 1 All ER 75, [1984] 1 WLR 251, CA (decided under the Agricultural Holdings Act 1948 (repealed)). A representation by a landlord as to the operation of the Rent Acts in respect of a particular dwelling house is a representation of law and does not create an estoppel: see *London County Territorial and Auxiliary Forces Association v Nichols* [1949] 1 KB 35, [1948] 2 All ER 432, CA; *Kai Nam v Ma Kam Chan* [1956] AC 358, [1956] 1 All ER 783, PC; cf, however, *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247 at 251, [1956] 1 WLR 29 at 36, CA, per Denning LJ.

8 Eg a person may be estopped from denying that he is in occupation of property: see *Benedictus v Jalaram Ltd* [1989] 1 EGLR 251, 58 P & CR 331, CA.

9 See eg *Murphy v A Birrell & Sons Ltd* [1978] IRLR 458, EAT (a case on the Scots doctrine of personal bar).

10 As to estoppel by record see PARA 953 ante, para 964 et seq post.

11 See the Matrimonial Causes Act 1973 s 1(3) (as prospectively repealed); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 348.

12 When a court determines any question with respect to the upbringing of a child or the administration of a child's property or the application of any income arising from it, the child's welfare must be the court's paramount consideration: see the Children Act 1989 s 1(1); and CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 300.

13 See eg *Thompson v Thompson* [1957] P 19 at 29, [1957] 1 All ER 161 at 165, CA, per Denning LJ. As to estoppels in ancillary relief proceedings see *Porter v Porter* [1971] P 282 at 284-285, [1971] 2 All ER 1037 at 1039-1040 per Ormrod J. As to the inappropriateness of the strict application of estoppel by record in proceedings under the Children Act 1989 see eg *K v P (Children Act proceedings: estoppel)* [1995] 2 FCR 457, [1995] 1 FLR 248; *Re S (minors) (care orders: appeal out of time)* [1996] 2 FCR 838, sub nom *Re S (minors) (discharge of care order)* [1995] 2 FLR 639, CA; *Re L (minors) (care proceedings: issue estoppel)* [1996] 1 FCR 221, sub nom *Re S, S and A (care proceedings: issue estoppel)* [1995] 2 FLR 244. See also *Re B (minors) (care proceedings: issue estoppel)* [1997] Fam 117, sub nom *Re B (minors) (care proceedings: evidence)* [1997] 2 All ER 29; *J v Reading Borough Council* [2002] All ER (D) 292 (Dec). As to estoppel in matrimonial and divorce proceedings generally see further PARAS 986, 998 post.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/1. NATURE, CLASSIFICATION AND PRINCIPLES OF ESTOPPEL/961. Estoppel and public authorities.

### 961. Estoppel and public authorities.

It is an established rule that where a statute, enacted for the benefit of a section of the public, imposes a duty of a positive kind, the person or body charged with the performance of the duty (normally a public authority which is a creature of statute) cannot be prevented by estoppel from exercising his or its statutory powers<sup>1</sup>. Nor is it permissible to use estoppel to enable or oblige a public authority to do something which is beyond its statutory powers<sup>2</sup>.

It has been stated that a public authority cannot be estopped from doing its duty but can be estopped from relying on technicalities<sup>3</sup>. The issue has arisen most often in the context of town and country planning. Estoppel has not normally operated to restrain enforcement of planning control<sup>4</sup> and the House of Lords has now ruled that it is unhelpful to introduce private law concepts of estoppel into planning law, pointing out that estoppels bind individuals on the ground that it will be unconscionable for them to deny what they have represented or agreed, but that those concepts of private law should not be extended into the public law of planning control, which binds everyone<sup>5</sup>. Further, although there is an analogy between a private law estoppel and the public law concept of a legitimate expectation created by a public authority<sup>6</sup>, it is no more than an analogy, because remedies against public authorities have to take into account the interests of the general public that the authority exists to promote and public law can also take into account the hierarchy of individual rights which exist under the Human Rights Act 1998<sup>7</sup>.

It seems also that the doctrine of issue estoppel may not be applicable in judicial review proceedings<sup>8</sup>.

1 *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610, [1937] 1 All ER 748, PC; *Customs and Excise Comrs v Hebdson Ltd* [1953] 2 Lloyd's Rep 382 at 396 per Pearson J (cf *IRC v Brooks* [1915] AC 478 at 491, HL, per Lord Parker of Waddington); *Society of Medical Officers of Health v Hope (Valuation Officer)* [1960] AC 551 at 568, [1960] 1 All ER 317 at 324, HL, per Lord Keith of Avonholm; *North Western Gas Board v Manchester Corpn* [1963] 3 All ER 442, [1964] 1 WLR 64, CA; and see eg *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 All ER 257, [1959] 1 WLR 465 (council, having acted beyond its powers in granting a lease, could not be estopped from denying its validity); *Animal Virus Institute v Customs and Excise Comrs* [1988] VATTR 56, VAT Tribunal (no estoppel could lie against statutory provision for charging of value added tax, which was mandatory, nor hinder commissioners' exercise of statutory discretion to make an assessment; however, where a clear and unequivocal ruling in writing sought and obtained, public policy might operate to estop the making of an assessment which conflicted with the ruling).

As to whether this rule applies where the statute bestows a discretion rather than imposing a duty see eg *Southend-on-Sea Corpn v Hodgson (Wickford) Ltd* [1962] 1 QB 416 at 423-424, [1961] 2 All ER 46 at 48-49, DC, per Lord Parker of Waddington (local planning authority cannot be estopped from exercising its discretion whether to enforce compliance with enforcement notice); *Essex County Council v Ministry of Housing and Local Government* (1967) 18 P & CR 531 (Minister cannot deprive himself of the discretion bestowed on him by statute in making development orders). As to town and country planning cases see now, however, the text and notes 5-7 *infra*.

2 See eg *Cottrell-Dormer v Bristol Corpn* (1950) 2 P & CR 230, Lands Tribunal; *Minister of Agriculture and Fisheries v Matthews* [1950] 1 KB 148, [1949] 2 All ER 724.

3 *Wells v Minister of Housing and Local Government* [1967] 2 All ER 1041 at 1044, [1967] 1 WLR 1000 at 1007, CA, per Lord Denning MR; followed in *Re L (AC) (an infant)* [1971] 3 All ER 743 (corporation held to be estopped, by a representation that no written notice of objection to a resolution under the Children Act 1948 (repealed) was necessary, from alleging that none had been issued in time); *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222, [1970] 3 All ER 496, CA (local planning authority which delegated authority to its planning officer to inform a developer that a variation in the detailed plan for which planning permission had been granted was not material, estopped from later maintaining that further planning



permission was necessary); *Norfolk County Council v Secretary of State for the Environment* [1973] 3 All ER 673, [1973] 1 WLR 1400, DC.

4 See *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204, CA; *Bedfordia Plant Ltd v Secretary of State for the Environment and North Bedfordshire District Council* [1981] JPL 122, DC; *R v East Sussex County Council, ex p Reprotech (Pebsham) Ltd* [2002] UKHL 8, [2002] 4 All ER 58, [2003] 1 WLR 348; and TOWN AND COUNTRY PLANNING. As to the limited circumstances in which the authority may be bound by an officer acting without specific delegated powers see *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222, [1970] 3 All ER 496, CA; *Western Fish Products Ltd v Penwith District Council* supra; *Bedfordia Plant Ltd v Secretary of State for the Environment and North Bedfordshire District Council* supra; cf *Le Roi v Salisbury District Council* [2001] All ER (D) 01 (Jul); affd [2001] EWCA Civ 1490, [2001] All ER (D) 30 (Oct). Where enforcement proceedings have already been brought unsuccessfully, the doctrine of issue estoppel may, however, prevent the authority from issuing a fresh notice in respect of the same breach of control: *Thrasivoulou v Secretary of State for the Environment* [1988] QB 809, [1988] 2 All ER 781, CA; affd [1990] 2 AC 273, [1990] 1 All ER 65, HL. As to issue estoppel see PARA 980 et seq post.

5 See *R v East Sussex County Council, ex p Reprotech (Pebsham) Ltd* [2002] UKHL 8 at [33], [2002] 4 All ER 58, [2003] 1 WLR 348 per Lord Hoffmann, citing *Newbury District Council v Secretary of State for the Environment, Newbury District Council v International Synthetic Rubber Co Ltd* [1981] AC 578 at 616, [1980] 1 All ER 731 at 752, HL, per Lord Scarman.

6 As to legitimate expectation see JUDICIAL REVIEW vol 61 (2010) PARA 649.

7 See *R v East Sussex County Council, ex p Reprotech (Pebsham) Ltd* [2002] UKHL 8 at [34], [2002] 4 All ER 58, [2003] 1 WLR 348 per Lord Hoffmann; and see also at [8] per Lord Mackay of Clashfern.

8 See *R (on the application of Munjaz) v Mersey Care NHS Trust*; *R (on the application of S) v Airedale NHS Trust* [2003] EWCA Civ 1036 at [79], [2003] All ER (D) 265 (Jul); and PARA 983 post.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/1. NATURE, CLASSIFICATION AND PRINCIPLES OF ESTOPPEL/962. Concepts closely related to estoppel; approbation and reprobation.

**962. Concepts closely related to estoppel; approbation and reprobation.**

On the principle that a person may not approbate and reprobate<sup>1</sup>, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel by representation. The principle that a person may not approbate and reprobate expresses two propositions:

- 9 (1) that the person in question, having a choice between two courses of conduct, is to be treated as having made an election from which he cannot resile; and
- 10 (2) that he will not be regarded, in general at any rate, as having so elected unless he has taken a benefit under or arising out of the course of conduct which he has first pursued and with which his subsequent conduct is inconsistent<sup>2</sup>.

Thus a claimant, having two inconsistent claims, who elects to abandon one and pursue the other may not, in general<sup>3</sup>, afterwards choose to return to the former claim and sue on it<sup>4</sup>; but this rule of election does not apply where the two claims are not inconsistent and the circumstances do not show an intention to abandon one of them<sup>5</sup>. The common law principle which puts a person to his election between alternative inconsistent courses of conduct has no connection with the equitable doctrine of election and relates mainly, though not exclusively, to alternative remedies in a court of justice<sup>6</sup>. It is subject, in civil proceedings to which the Civil Procedure Rules ('the CPR') apply, to the overriding objective of dealing with cases justly<sup>7</sup>.

The following are examples of the common law principle of election:

- 11 (a) after taking an advantage under an order<sup>8</sup>, a party may be precluded from saying that it is invalid and asking to set it aside<sup>9</sup>, or from setting up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded<sup>10</sup>; conversely, it is contrary to good faith and equity that a person who, though not a party to proceedings and not bound by a judgment in them, yet knew all the circumstances and deliberately took the benefit of the judgment and stood by when he might have taken steps, by becoming a party or otherwise, to controvert it, should afterwards raise a second time the question determined by the judgment<sup>11</sup>;
- 12 (b) if a person is entitled to one of two inconsistent rights, as opposed to having a choice between two alternative remedies<sup>12</sup>, and, with full knowledge, he does an unequivocal act showing that he has chosen one, he cannot afterwards pursue the other<sup>13</sup>;
- 13 (c) the rule that a party who has accepted some benefit granted to him by deed cannot disregard the conditions on which the benefit was expressed in the deed to be conferred<sup>14</sup> is an example of the principle that a person cannot both approbate and reprobate; a party may be prevented by the operation of the same principle from succeeding in a suit for nullity of marriage by the fact that he has approbated the marriage by his conduct or taken advantages from the marriage that make it unfair or inequitable to permit him to treat it as if it had never existed<sup>15</sup>.

Other examples of the common law principle are election whether to affirm a contract induced by fraud or to avoid it<sup>16</sup>, whether to waive a tort and claim in contract<sup>17</sup> or whether, in a case of

wrongful conversion, to waive the tort and recover the proceeds in a claim for money had and received<sup>18</sup>.

1 The origin of this maxim is discussed in *Lissenden v CAV Bosch Ltd* [1940] AC 412 at 417, 418, [1940] 1 All ER 425 at 429, HL, per Viscount Maugham, but in England the maxim appears not to express any formal legal concept: see *Lissenden v CAV Bosch Ltd* supra at 429 and at 436 per Lord Atkin. See also *Harrison v Wells* [1967] 1 QB 263 at 277, [1966] 3 All ER 524 at 530, CA, per Salmon LJ, not followed in *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, [1977] 2 All ER 293, CA.

2 See *Banque des Marchands de Moscou (Koupetschesky) v Kindersley* [1951] Ch 112 at 119, 120, [1950] 2 All ER 549 at 552, CA, per Sir Raymond Evershed MR (citing *Smith v Baker* (1873) LR 8 CP 350; *Re Morton, ex p Robertson* (1875) LR 20 Eq 733; *Evans v Bartlam* [1937] AC 473 at 479, [1937] 2 All ER 646 at 649, HL, per Lord Atkin, and at 483 and at 652 per Lord Russell of Killowen).

3 In a proper case the court may in its discretion relieve a party from the effects of an election made by mistake: *S Kaprow & Co Ltd v Maclelland & Co Ltd* [1948] 1 KB 618, [1948] 1 All ER 264, CA.

4 See eg *Scarf v Jardine* (1882) 7 App Cas 345, HL; *Morel Bros & Co v Earl of Westmoreland* [1904] AC 11, HL. Cf *Re Shepherd, Harris v Shepherd* [1943] Ch 8, [1942] 2 All ER 584 (election whether or not to accept gift under will, the gift being conditional on the execution of settlement of other property; no estoppel could be raised to oblige the donee to execute the settlement as the donee had not yet made an unequivocal act of election). See also *Re Alfred Herbert Ltd Pension and Life Assurance Scheme Trusts, Alfred Herbert Ltd v Hancocks* [1960] 1 All ER 618 at 626, [1960] 1 WLR 271 at 276-277 obiter per Cross J. As to election by estoppel see PARA 1060 post.

5 *Rosenfeld v Newman* [1953] 2 All ER 885, [1953] 1 WLR 1135, CA (county court possession proceedings on grounds of trespass and under the Rent Restrictions Acts; owing to the value of the property the county court had no jurisdiction in the claim for trespass; the plaintiff pursued the claim under the Rent Restrictions Acts and was not estopped from afterwards pursuing the claim in trespass in the High Court; election not on grounds of inconsistent claims but by reason of jurisdiction).

6 See *Lissenden v CAV Bosch Ltd* [1940] AC 412 at 418-419, [1940] 1 All ER 425 at 429, HL, per Viscount Maugham; *Young v Bristol Aeroplane Co Ltd* [1946] AC 163 at 172-173, [1946] 1 All ER 98 at 102-103, HL, per Viscount Simon. An election, if it is to be binding, must be clearly and unequivocally made: see *Rosenfeld v Newman* [1953] 2 All ER 885 at 887, [1953] 1 WLR 1135 at 1139, CA, per Sir Raymond Evershed MR. Nor will a party be held to have exercised an option unless aware that he had it: *Knipe v British Railways Board* [1972] 1 QB 361 at 368, [1972] 1 All ER 673 at 676-677, CA, per Lord Denning MR. A party cannot elect to rescind a contract if he is unaware of his rights of election and rescission: *Peyman v Lanjani* [1985] Ch 457, [1984] 3 All ER 703, CA. As to the equitable doctrine of election see EQUITY vol 16(2) (Reissue) PARA 724 et seq.

The doctrine of approbation and reprobation is applicable to the decisions of adjudicators: *R Durnell & Sons Ltd v Kaduna Ltd* [2003] EWHC 517 (TCC), [2003] All ER (D) 281 (Mar) (no application on the facts of that case). For that doctrine to apply, it is necessary for a party, with knowledge that it is open to him to object to the decision, to take the 'benefit' of part of it, but 'benefit' does not simply depend on whether a party has obtained a net cash sum or an entitlement to payment; it is also a 'benefit' to a party, for the purposes of the doctrine, that his liability to another party in respect of a particular matter is crystallised on an interim basis at a particular amount, even though that is an amount that he is called on to pay: *R Durnell & Sons Ltd v Kaduna Ltd* supra.

7 As to the overriding objective see CPR 1.1; and CIVIL PROCEDURE vol 11 (2009) PARA 33; and as to the application of the CPR see CIVIL PROCEDURE vol 11 (2009) PARA 32.

8 Eg an order for the payment of costs.

9 *Tinkler v Hilder* (1849) 4 Exch 187; *Mills v Duckworth* [1938] 1 All ER 318 at 320, CA; and see *Gandy v Gandy* (1885) 30 ChD 57, CA; *B (MAL) v B (NE)* [1968] 1 WLR 1109. In *R v Taylor, R v Amendt* [1915] 2 KB 593 a person who had, upon his own application and for his own purposes and profit, obtained a licence and made use of it, was not allowed subsequently to contend that it was void; cf *Caird v Moss* (1886) 33 ChD 22, CA; *Williams v Evans* [1911] P 175 (the fact of an executor, who is also the testator's next of kin, having taken out probate does not prevent him from disputing the will); *Lloyd v Grace, Smith & Co* [1912] AC 716 at 738, HL; *Verschures Creameries v Hull and Netherlands Steamship Co* [1921] 2 KB 608, CA (owners of goods, having elected to treat a delivery of goods by their agent to a wrong consignee as an authorised delivery by suing the consignee for the price of the goods, precluded from suing their agent for misdelivery); *Re Simms, ex p Trustee* [1934] Ch 1, CA (trustee in bankruptcy endeavouring at one and the same time to treat the receiver of a company as a wrongdoer in completing certain contracts, and yet in doing so as having left them alive for the trustee's benefit). Some difficulty arose over the application of this principle in connection with the remedies formerly given by the legislation relating to workmen's compensation, the question being whether by accepting payments made on the award of a county court or voluntarily by his employer the workman had approbated

that judgment so as to preclude appeal as to the amount of the award, or so elected his course of action as to preclude an action on his rights at common law. Acceptance of the sums payable under the county court award was held not to preclude appeal (see *Lissenden v CAV Bosch Ltd* [1940] AC 412, [1940] 1 All ER 425, HL, overruling *Johnson v Newton Fire Extinguisher Co Ltd* [1913] 2 KB 111, CA and decisions following the ruling in that case; and see *Mills v Duckworth* [1938] 1 All ER 318, CA), and it was held that a workman did not lose his alternative remedy provided he accepted the sums in ignorance of his right to elect and did not persist in receiving them after becoming aware of his alternative course (see *Young v Bristol Aeroplane Co Ltd* [1946] AC 163, [1946] 1 All ER 98, HL; see also *Knipe v British Railways Board* [1972] 1 QB 361 at 368, [1972] 1 All ER 673 at 676-677, CA, per Lord Denning MR).

10 *Roe v Mutual Loan Fund Ltd* (1887) 19 QBD 347, CA; followed in *Comitti v Maher* (1905) 94 LT 158; cf *Scarf v Jardine* (1882) 7 App Cas 345 at 353, 360, HL; *Hone v Boyle, Low, Murray & Co* (1891) 27 LR Ir 137, CA; *Neale v Electric and Ordnance Accessories Co Ltd* [1906] 2 KB 558, CA; *McGlade v Royal London Mutual Insurance Society Ltd* [1910] 2 Ch 169, CA (plaintiff could not sue as member of a company on the footing that the resolution by which it was converted from a friendly society into a company was invalid). See also *Law v Law* [1905] 1 Ch 140 at 158-159, CA (partner who, under a consent order, accepted money due under a contract for the sale of his share in the partnership from the other partner precluded from later claiming damages from that partner on the basis that the sale should be set aside); *Re A Bankruptcy Notice* [1924] 2 Ch 76 at 97, 100, CA, explaining *Roe v Mutual Loan Fund Ltd* supra; and see *Re Wilson, ex p Jones* (1916) 85 LJBK 1408, CA; *Huddersfield Fine Worsteds Ltd v Todd* (1925) 134 LT 82; *Kok Hoong v Leong Cheong Kweng Mines Ltd* [1964] AC 993 at 1017, [1964] 1 All ER 300 at 309, PC (where *Roe v Mutual Loan Fund Ltd* supra was explained on the basis of the rule forbidding approbation and reprobation by a litigant); and see PARA 1022 post.

Such a person may not be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it (*Re Eyton, Bartlett v Charles* (1890) 45 ChD 458; cf *Re Bond, ex p Bacon* (1881) 17 ChD 447 at 451, CA); nor will a judgment creditor who, after succeeding in interpleader proceedings, takes out of court money paid into court as representing the value of the goods to abide the event, be allowed afterwards to seize the same goods in respect of the unsatisfied balance of the same judgment debt so as to get the value of the goods twice over (*Haddow v Morton* [1894] 1 QB 565, CA). As to payment into and out of court see further PARAS 967, 1010 post.

11 *Re Lart, Wilkinson v Blades* [1896] 2 Ch 788 at 795; cf *Roberts v Madocks* (1843) 13 Sim 549 at 558-559 (affd (1845) 6 LTOS 185); *Re King, Jackson v A-G* [1917] 2 Ch 420 (legatee accepting result of compromise of probate action held bound by its terms). See also *Lord Tredegar v Windus* (1875) LR 19 Eq 607 (party, having sued in equity and his suit having been dismissed on the merits, restrained from afterwards seeking to obtain similar relief at law); following *Phelps v Prothero, Prothero v Phelps* (1855) 7 De GM & G 722 (plaintiff, after successfully suing in equity for specific performance, restrained from suing at law for damages but granted an inquiry in the equity suit for the same purpose, although the facts afforded no defence to an action at law, which was for relief different from that sought in equity); and see *Phelps v Prothero* (1855) 16 CB 370; cf *Bushby v Ellis* (1853) 17 Beav 279; *Shrager v Basil Dighton Ltd* [1924] 1 KB 274, CA; *Law v Law* [1905] 1 Ch 140, CA (cited in note 10 supra).

12 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 29, [1940] 4 All ER 20 at 37, HL, per Lord Atkin; *Slough Estates Ltd v Slough Borough Council (No 2)* [1969] 2 Ch 305 at 318-319, [1969] 2 All ER 988 at 994, CA, per Lord Denning MR (affd on other grounds [1971] AC 958, [1970] 2 All ER 216, HL).

13 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 30-31, [1940] 4 All ER 20 at 37-38, HL, per Lord Atkin; followed in *Slough Estates Ltd v Slough Borough Council (No 2)* [1969] 2 Ch 305, [1969] 2 All ER 988, CA (affd on other grounds [1971] AC 958, [1970] 2 All ER 216, HL) (acceptance of compensation in respect of refusal of planning permission in 1955 waived or abandoned planning permission granted in 1945 in respect of same land). See also *Dexters Ltd v Hill Crest Oil Co (Bradford) Ltd* [1926] 1 KB 348, CA (party to an arbitration, having claimed and accepted first of three possible awards, barred from contending that the second award was right); *Baxter v Eckersley* [1950] 1 KB 480, [1950] 1 All ER 139, CA (landlord who had claimed increased rent on basis tenant was a statutory tenant barred from claiming in action against tenant that no statutory tenancy had arisen). The mere fact, however, of a person with two alternative remedies having in ignorance of his rights pursued one and received a payment thereby, will not prevent him from afterwards pursuing the other if he is able and willing to restore what he has received so as to prevent any wrong being done to any person by his change of remedy (*Re Collie, ex p Adamson* (1878) 8 ChD 807 at 818, CA; cf *Curtis v Williamson* (1874) LR 10 QB 57; *Young v Bristol Aeroplane Co Ltd* [1946] AC 163, [1946] 1 All ER 98, HL); he cannot of his own initiative, or even, possibly, with the consent of his opponent when the interests of third parties are involved, change his election (see eg *Jones v Carter* (1846) 15 M & W 718; *Scarf v Jardine* (1882) 7 App Cas 345, HL; *Morel Bros & Co v Earl of Westmoreland* [1904] AC 11, HL; *S Kaprow & Co Ltd v Maclelland & Co Ltd* [1948] 1 KB 618 at 629-630, [1948] 1 All ER 264 at 270-271, CA) but the court has power in a proper case and in its discretion to relieve a party from the effects of an election made by mistake (see note 3 supra; and PARA 1010 post). Where a claimant merely claims alternative reliefs, the general rule is that he may elect at the trial for which he will ask: *Farrant v Olver* (1922) 91 LJ Ch 758. He may, however, have made a prior election, for example by his pleadings, from which he will not be permitted thereafter to depart (*Vine v National Dock Labour Board* [1956] 1 QB 658, [1956] 1 All ER 1, CA); where relief is asked on footings which are inconsistent, eg damages on the basis of a contract having been repudiated and being discharged and a declaration on the basis that the contract is subsisting, the

claimant should be put to his election at the trial (*Vine v National Dock Labour Board* supra at 670 and at 6-7, CA, per Singleton LJ).

14 See *Westhoughton UDC v Wigan Coal and Iron Co* [1919] 1 Ch 159 at 174, CA, per Duke LJ; *Tito v Waddell (No 2)*, *Tito v A-G* [1977] Ch 106 at 289 et seq, [1977] 3 All ER 129 at 280 et seq; and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 64 (accepting benefit without execution). See also *Ashe v Hogan* [1920] 1 IR 159 (vendor of leasehold property who had accepted the benefit of a provision for payment of reduced rent so long as the covenants in the lease were observed estopped from denying liability under the covenants in the lease including one against alienation). As to assignment by estoppel see also PARA 1038 post.

15 See *Tindall v Tindall* [1953] P 63 at 72, 74-75, [1953] 1 All ER 139 at 143, 147, CA; cf *Hayward v Hayward (otherwise Prestwood)* [1961] P 152, [1961] 1 All ER 236 (a bigamous marriage which is null and void from the beginning cannot be approbated by conduct); and MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARA 321.

16 As to the loss of the right to rescind contracts for shares see COMPANIES; and as to the affirmation of contracts induced by misrepresentation or fraud generally see MISREPRESENTATION AND FRAUD.

17 See *Verschures Creameries v Hull and Netherlands Steamship Co* [1921] 2 KB 608 at 611, CA, per Bankes LJ (plaintiff, having recovered judgment for the price of goods sold and delivered, precluded from suing in negligence for misdelivery of the goods). It seems that a claimant does not waive a tort merely by claiming in contract. Once he has obtained judgment on the contract, however, he will have elected to abandon his remedy in tort: *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 at 15, [1940] 4 All ER 20 at 29-30, HL, per Viscount Simon LC and at 30-31 and at 36-37 per Lord Atkin.

18 See *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, [1940] 4 All ER 20, HL. For further examples see PARA 1060 post. As to the principle that a creditor is bound by a deed of arrangement to which he has assented see BANKRUPTCY AND INDIVIDUAL INSOLVENCY vol 3(2) (2002 Reissue) PARA 885. Such a creditor cannot withdraw his assent when a third party has altered his position in the belief, encouraged by the creditor, that the deed is unimpeachable: *Re Clarke, ex p Debtor v S Aston & Son Ltd* [1967] Ch 1121 at 1135-1136, [1966] 3 All ER 622 at 629, DC. A further example of what is called election, that is to say of a choice between courses which thereafter can become binding on the chooser so that he becomes disentitled to sue the party whom he has elected not to sue, may occur when he elects to sue the agent to the exclusion of the principal: see AGENCY vol 1 (2008) PARA 131.

## UPDATE

### 962 Concepts closely related to estoppel; approbation and reprobation

NOTE 5--See also *Nexus Communications Group Ltd v Lambert* (2005) Times, 3 March.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/1. NATURE, CLASSIFICATION AND PRINCIPLES OF ESTOPPEL/963. Facts relied on must be pleaded.

### **963. Facts relied on must be pleaded.**

The old rule was that estoppel by record and deed had to be pleaded if there was an opportunity<sup>1</sup>. If the party against whom the record was used gave by his pleading the opportunity of pleading the estoppel, and this was not done, the record could not be relied on as conclusive<sup>2</sup>, but as evidence only<sup>3</sup>. It was otherwise if no such opportunity was given<sup>4</sup>.

Under the modern practice, the facts relied on to establish an estoppel of any kind must be pleaded; thus in civil proceedings to which the Civil Procedure Rules ('the CPR') apply, such facts should be included in the statement of case<sup>5</sup> or, where the Part 8 procedure is used<sup>6</sup>, brought to the notice of the court in some other appropriate way.

1 It was otherwise with estoppels in pais: *Freeman v Cooke* (1848) 2 Exch 654 at 662; *Ashpittel v Bryan* (1863) 3 B & S 474 at 490, citing 1 Wms Saund (6th Edn) 325a note (d).

2 *Trevivian v Lawrence* (1704) 2 Ld Raym 1048 at 1051; *Magrath v Hardy* (1838) 4 Bing NC 782; and see *Potts v Nixon* (1870) IR 5 CL 45; *Feversham v Emerson* (1855) 11 Exch 385.

3 *Vooght v Winch* (1819) 2 B & Ald 662. A party relying on a deed might open the estoppel by putting in issue the facts which the deed was intended to conclude: *Wilson v Butler* (1838) 4 Bing NC 748.

4 *Trevivian v Lawrence* (1704) 2 Ld Raym 1048; *Morrison Rose & Partners v Hillman* [1961] 2 QB 266, [1961] 2 All ER 891, CA.

5 As to statements of case see CPR Pt 16; *Practice Direction--Statements of Case* PD 16; and CIVIL PROCEDURE vol 11 (2009) PARA 584 et seq; and as to the application of the CPR see CIVIL PROCEDURE vol 11 (2009) PARA 32. As to amendments to statements of case see CPR Pt 17; *Practice Direction--Amendments to Statements of Case* PD 17; and CIVIL PROCEDURE vol 11 (2009) PARA 607 et seq.

6 As to the Part 8 procedure see CPR Pt 8; *Practice Direction--Alternative Procedure for Claims* PD8A; *Practice Direction--Part 8* PD8B; and CIVIL PROCEDURE vol 11 (2009) PARAS 127-129.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/2. ESTOPPEL BY RECORD

## **2. ESTOPPEL BY RECORD**

### **UPDATE**

#### **964-1010 Estoppel by Record**

Material relating to these paragraphs has been revised and published under the title  
CIVIL PROCEDURE vols 11, 12 (2009).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(1) NATURE OF ESTOPPEL BY DEED/1011. Estoppel by deed may arise from statement of fact or creation of legal estate.

### 3. ESTOPPEL BY DEED

#### (1) NATURE OF ESTOPPEL BY DEED

##### 1011. Estoppel by deed may arise from statement of fact or creation of legal estate.

Estoppel by deed comprises two distinct, but overlapping concepts:

- 14 (1) estoppel by statement of fact in a deed<sup>1</sup>; and
- 15 (2) estoppel arising from the creation of a legal relationship in a deed<sup>2</sup>.

The latter concept also overlaps in some respects with estoppel in pais, as that term is used in this title<sup>3</sup>, and has been described as 'estoppel as to title'<sup>4</sup> but there is no judicial authority for that description<sup>5</sup>.

Estoppel by deed is a formal estoppel<sup>6</sup> arising from inconsistency alone, without the need to prove detrimental reliance<sup>7</sup>, and the state of mind of the parties is generally unimportant<sup>8</sup>.

Where a statement is made which cannot give rise to estoppel by deed, for example where the purported deed is unexecuted<sup>9</sup>, it may, if it has been relied upon, give rise to estoppel by representation<sup>10</sup>. Further, it has been held that there is no policy reason why estoppel by representation may not operate to exclude evidence that a deed purporting to comply with the necessary statutory formalities for execution does not in fact so comply<sup>11</sup>.

1 See PARA 1014 et seq post.

2 See PARA 1029 et seq post.

3 See PARA 955 ante, para 1043 et seq post.

4 See Cooke *The Modern Law of Estoppel* (OUP, 2000) pp 8-13.

5 Estoppel arising from the creation of a legal relationship in a deed has been judicially described as 'appropriately called estoppel by deed, although not necessarily in any technical sense': see *First National Bank plc v Thompson*[1996] Ch 231 at 243, [1996] 1 All ER 140 at 151, CA, per Staughton LJ, where estoppel by statement of fact in a deed is described as 'common law estoppel by representation'. The term 'common law estoppel by representation' is used in a different sense in this title: see PARA 1076 et seq post.

6 See PARA 952 ante.

7 See eg *Newham London Borough Council v Phillips*[1998] 1 FLR 613, (1997) 30 HLR 859, CA.

8 See, however, para 1020 the text and note 4 post.

9 As to the formalities required for execution of a deed see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 27 et seq.

10 Cf *TCB Ltd v Gray*[1986] Ch 621, [1986] 1 All ER 587; affd on other grounds [1987] Ch 458n, [1988] 1 All ER 108, CA. As to estoppel by representation see PARA 1052 et seq post.

11 See *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35, [2001] 4 All ER 138.



Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(1) NATURE OF ESTOPPEL BY DEED/1012. Estoppels ought to be mutual.

### **1012. Estoppels ought to be mutual.**

A maxim which is stated by the old writers as applicable to estoppels generally is that they 'ought to be mutual' or 'reciprocal'<sup>1</sup>, which means that they must bind both parties, and that a stranger may neither take advantage of nor be bound by them. This maxim has an important bearing on the law of estoppel by record<sup>2</sup>. Its application to estoppel by deed depends, in the case of a deed between parties, on the construction of the deed<sup>3</sup>; and it is to some extent true of estoppel between landlord and tenant<sup>4</sup>. It seems that an estoppel may, however, arise from a statement made in a deed executed by one party only (formerly known as a 'deed poll')<sup>5</sup>.

1 Co Litt 352a; Bac Abr, Leases and Terms for Years (O), citing *James v Landon* (1585) Cro Eliz 36.

2 As to parties bound by an estoppel by record see PARA 994 et seq ante.

3 See PARA 1020 post.

4 *Cadle v Moody* (1861) 30 LJ Ex 385 at 387 per Bramwell B; see also *Hartcup & Co v Bell* (1883) Cab & El 19. See also *Bell v General Accident Fire & Life Assurance Corp'n Ltd* [1998] 1 EGLR 69, [1998] 17 EG 144, CA (tenancy by estoppel; foundation of the doctrine is that neither landlord nor tenant is allowed to deny the other's title).

5 See PARA 1014 note 1 post.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(1) NATURE OF ESTOPPEL BY DEED/1013. Mistake and rectification.

**1013. Mistake and rectification.**

If one party to a transaction knows that the instrument involved contains a mistake in his favour but does nothing to correct it, he and those claiming under him will be precluded from resisting rectification on the ground that the mistake is unilateral and not common<sup>1</sup>. This doctrine differs from estoppel<sup>2</sup> and is discussed elsewhere in this work<sup>3</sup>.

1 See *A Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555 at 570-571, [1961] 2 All ER 545 at 551-552 per Pennycuik J, approving Snell's Principles of Equity (25th Edn, 1960) p 569 (see now (30th Edn, 2000, p 698 (para 43-13)).

2 See EQUITY vol 16(2) (Reissue) PARA 909.

3 As to the remedy of rectification see MISTAKE vol 77 (2010) PARA 57 et seq.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1014. In general.

## (2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED

### 1014. In general.

Estoppel arising from a statement of fact in a deed<sup>1</sup> is based on the principle that when a person has made a statement of fact in a deed he will not be permitted to deny any matter which he has so asserted<sup>2</sup>. It is a rule of evidence according to which certain evidence is taken to be of so high and conclusive a nature as to admit of no contradictory proof<sup>3</sup>. The averment relied upon to work an estoppel must be 'certain to every intent' without any ambiguity<sup>4</sup>, but may be contained in the recital or in any part of the deed<sup>5</sup>. A mere mistake in a deed, on account of which no one has acted, will not give rise to an estoppel but may give grounds for rectification<sup>6</sup>.

1 Co Litt 352b; 2 Bl Com (14th Edn) 295; Bac Abr, Leases and Terms for Years (O); Shep Touch 53, showing that estoppel is not confined to indentures (deeds between parties), but may be raised by a deed poll (a deed executed by one party only). The terms 'indenture' and 'deed poll' have now largely fallen out of use: see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 3. There is no case of estoppel by deed poll, but see *Right d Jefferys v Bucknell* (1831) 2 B & Ad 278 at 282 per Lord Tenterden CJ; *Foster v Mentor Life Assurance Co* (1854) 3 E & B 48; *Re Ghost's Trusts* (1883) 49 LT 588 at 590. In *Cropper v Smith* (1884) 26 ChD 700, CA, an action arising upon the assignment of a patent, at 705 Cotton LJ seems to assume that an estoppel may arise on a deed poll; at 708 Bowen LJ, however, held that there was not estoppel by deed 'because the people who claim against [the patentee] are not parties or privies to the deed', but this principle would clearly apply to all deeds poll; at 713 Fry LJ expresses no opinion as to the validity of the argument 'that estoppel may arise between the maker of a deed poll and all to whom it is addressed, in this case, all men'. The court was unanimous that no estoppel arose on the facts, and on this they were affirmed (*Smith v Cropper* (1885) 10 App Cas 249 at 259, HL, without reasons given). As to the meaning and effect of deeds generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 1-9, 57-66.

The recitals in a deed are not conclusive against parties who have not executed it (*Doe d Shelton v Shelton* (1835) 3 Ad & El 265; *Cardwell v Lucas* (1836) 2 M & W 111 at 117 per Parke B; *Foligno v Martin* (1852) 22 LJ Ch 502; *Foster v Mentor Life Assurance Co* (1854) 3 E & B 48; *Bulley v Bulley* (1874) 9 Ch App 739) unless the deed has been acted upon, in which case a party who has acted upon the deed may be bound by it even though he did not execute it (*Webb v Spicer* (1849) 13 QB 886; revsd on other grounds 13 QB 894, Ex Ch; on appeal sub nom *Salman v Webb and Franklin* (1852) 3 HL Cas 510). No estoppel is created by an imperfect deed: *Re Balkis Consolidated Co Ltd* (1888) 58 LT 300 (no seal upon the deed, but only a mark showing the place where a seal was intended). Any rule of law which requires a seal for the valid execution of an instrument as a deed by an individual was abolished by the Law of Property (Miscellaneous Provisions) Act 1989 in relation to instruments delivered as deeds on or after 31 July 1990: s 1(1)(b). The reference to the execution of a deed by an individual does not, however, include execution by a corporation sole or a body corporate, to which the common law rule continues to apply: s 1(10). As to the execution of deeds by or on behalf of corporations see the Law of Property Act 1925 s 74 (as amended); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 40-42.

As the effect of covenants not to sue in separation agreements on the bringing of proceedings for nullity or divorce see MATRIMONIAL AND CIVIL PARTNERSHIP LAW vol 72 (2009) PARAS 425, 438.

2 *Greer v Kettle* [1938] AC 156 at 171, [1937] 4 All ER 396 at 404, HL, per Lord Maugham; *Bowman v Taylor* (1834) 2 Ad & El 278 at 291 per Taunton J; *Goodtitle d Edwards v Bailey* (1777) 2 Cowp 597; *Bonner v Wilkinson* (1822) 1 Dow & Ry KB 328; *Roberts v Security Co Ltd* [1897] 1 QB 111, CA. As to the necessity of pleading estoppel see PARA 963 ante.

3 Co Litt 352b note 306; *Simm v Anglo-American Telegraph Co, Anglo-American Telegraph Co v Spurling* (1879) 5 QBD 188 at 206, CA, per Brett LJ; *Low v Bouverie* [1891] 3 Ch 82 at 101, CA; and, among older cases, *Rainsford v Smith* (1560) 2 Dyer 196a; *Jones v Williams* (1817) 2 Stark 52; *Harding v Ambler* (1838) 3 M & W 279.

4 *Heath v Crealock* (1874) 10 Ch App 22; *Re Holland, Gregg v Holland* [1902] 2 Ch 360 at 387, CA. In ejectment by a landlord to recover a cellar, it was held that the plaintiff was not estopped by his lease from

showing that the cellar was not comprised in it: *Doe d Freeland v Burt* (1787) 1 Term Rep 701; and see *Doe d Butcher v Musgrave* (1840) 1 Man & G 625.

5 *Shelley v Wright* (1737) Willes 9; *Lainson v Tremere* (1834) 1 Ad & El 792; *Bowman v Taylor* (1834) 2 Ad & El 278 at 293; *Crofts v Middleton* (1855) 2 K & J 194 at 204; *Re King's Settlement, King v King* [1931] 2 Ch 294 (an estoppel set up by a definite misstatement of fact in the operative part of the deed as to the consideration); but it is not clear whether the words coming after 'in witness whereof' are part of the deed (*Pearse v Morrice* (1834) 2 Ad & El 84). The statement of the date is no estoppel, because a deed operated from date of delivery (*Taylor v McCalmont* (1855) 4 WR 59); but, if the date of a lease is altered after execution, the landlord is estopped from showing that the date inserted by him in the lease is not the date from which the demise operated so as to prevent anyone claiming under the lease from relying upon the circumstances existing at the date which the lease bears (*Rudd v Bowles* [1912] 2 Ch 60).

6 See PARA 962 ante, para 1023 post.

## **UPDATE**

### **1014 In general**

NOTE 1--As to execution by a corporation aggregate see also the 1925 Act s 74A (added by the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906); and CORPORATIONS vol 9(2) (2006 Reissue) PARA 1265.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1015. Effect of recitals.

### 1015. Effect of recitals.

A party is estopped from denying any specific facts<sup>1</sup> contained in a recital in a deed to which he is a party<sup>2</sup>, provided the recital is certain, precise and unambiguous<sup>3</sup>. He is not bound by inferences which may be drawn from the statements in a deed<sup>4</sup>; and a recital which, although incomplete, is true so far as it goes does not prevent the party from averring what is necessary to complete the truth<sup>5</sup>.

1 *Salter v Kidley* (1688) 1 Show 58; *Bensley v Burdon* (1830) 8 LJOS Ch 85, as explained in *Right d Jefferys v Bucknell* (1831) 2 B & Ad 278 at 282 per Lord Tenterden CJ; *Bullery v Bulley* (1874) 9 Ch App 739 at 751. A recital of a devise (*Clarke v Hall* (1888) 22 LR Ir 383 at 387 per Morris CJ; affd 24 LR Ir 316, CA), and a recital in a mortgage deed, binding a son party with his father, that the father is entitled in fee (*Guardian Assurance Co v Viscount Avonmore* (1872) IR 6 Eq 391) have been held to give rise to an estoppel.

2 *Cossens v Cossens* (1737) Willes 25; *Shelley v Wright* (1737) Willes 9; *Bowman v Taylor* (1834) 2 Ad & El 278 at 290 per Lord Denman, expressly overruling Co Litt 352b[h]; *Jones v Williams* (1817) 2 Stark 52; *Pearl Life Assurance Co v Johnson*, *Pearl Life Assurance Co v Greenhalgh* [1909] 2 KB 288; cf *Woolwich Equitable Building Society v Marshall* [1952] Ch 1, [1951] 2 All ER 769. For exceptions to this general rule see PARA 1021 et seq post.

3 *Right d Jefferys v Bucknell* (1831) 2 B & Ad 278; *Heath v Crealock* (1874) 10 Ch App 22 at 30; *Poulton v Moore* [1915] 1 KB 400 at 413, 415, CA (the word 'entitled' is the apt word to describe a complete title to a right of way). Cf *Ontario and Minnesota Power Co v R* [1925] AC 196, PC (a company, having taken the benefit of an Order in Council, held to have accepted an incorrect recital as correct); *District Bank Ltd v Webb* [1958] 1 All ER 126, [1958] 1 WLR 148 (recital in conveyance that vendor seised in unincumbered fee simple in possession not a clear and unambiguous representation that the land was not subject to a lease).

4 *Crofts v Middleton* (1855) 2 K & J 194 at 204; *General Finance, Mortgage and Discount Co v Liberator Permanent Benefit Building Society* (1878) 10 ChD 15; *Onward Building Society v Smithson* [1893] 1 Ch 1, CA; *Williams v Pinckney* (1897) 67 LJ Ch 34, CA; *Re Pilet, ex p A Toursier & Co and Berkeley* [1915] 3 KB 519; *Torbay Hotel Ltd v Jenkins* [1927] 2 Ch 225 at 237.

5 *Lovett v Lovett* [1898] 1 Ch 82.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1016. No estoppel by implication.

### **1016. No estoppel by implication.**

Nothing is to be taken by way of 'intendment'; there is no such thing as an estoppel by something implied<sup>1</sup>, and the averment relied upon to work an estoppel must be of something particular, not of a generality<sup>2</sup>. A covenant that a person has a thing is not equivalent to a positive statement that he has it, and consequently, in order to work an estoppel, a recital of title must aver precisely that the person entitled is seised in fee or has the legal estate<sup>3</sup>, and thus the operative words of an ordinary conveyance by grant create no estoppel<sup>4</sup>.

1 *Bowman v Taylor* (1834) 2 Ad & El 278 at 292; *Right d Jefferys v Bucknell* (1831) 2 B & Ad 278 at 282; cf *Doe d Shelton v Shelton* (1835) 3 Ad & El 265 at 283 (a person executing a deed of conveyance is not estopped by recitals contained in anterior deeds which go to make up his title); *Cutler v Bower* (1848) 11 QB 973 at 988; *Gillett v Abbott* (1838) 7 Ad & El 783. See also *Re Distributors and Warehousing Ltd* [1986] BCLC 129 at 139-140.

2 1 Roll Abr, Estoppel (P), pl 1, citing *Doddington's Case, Hall d Doddington v Peart* (1594) 2 Co Rep 32b at 33b; *Salter v Kidley* (1688) 1 Show 58; *Bensley v Burdon* (1830) 8 LJOS Ch 85.

3 *General Finance, Mortgage and Discount Co v Liberator Permanent Benefit Building Society* (1878) 10 ChD 15, following *Right d Jefferys v Bucknell* (1831) 2 B & Ad 278; *Heath v Crealock* (1874) 10 Ch App 22, followed by *Williams v Pinckney* (1897) 67 LJ Ch 34, CA; *Re Horton, Horton v Perks, Horton v Clark* (1884) 51 LT 420 at 423; cf *Doe d North v Webber* (1837) 3 Bing NC 922; *Rayson v Adcock* (1863) 9 Jur NS 800. See also *Cumberland Court (Brighton) Ltd v Taylor* [1964] Ch 29, [1963] 2 All ER 536 (vendor barred by recital in conveyance that he was seised free from incumbrances from exercising his rights as a legal chargee under a legal charge of which he took a transfer after the conveyance); and PARA 1033 post.

4 *Heath v Crealock* (1874) 10 Ch App 22. For the case of lease and release see *Crofts v Middleton* (1855) 2 K & J 194 (on appeal (1856) 8 De GM & G 192). In an innocent conveyance there can be no estoppel: *Lovett v Lovett* [1898] 1 Ch 82 at 88 per Romer J. As to the meaning of the words 'give' or 'grant' in a deed see the Law of Property Act 1925 s 59(2) (the word 'give' or 'grant' does not, in a deed made after 1 October 1845, imply any covenant in law, save where otherwise provided by statute); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 256.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1017. No estoppel where the truth appears by the same instrument.

**1017. No estoppel where the truth appears by the same instrument.**

Where the truth appears by the same instrument, there can be no estoppel<sup>1</sup> unless a clear intention is expressed in the deed to disregard the rule<sup>2</sup>.

<sup>1</sup> *Right d Jefferys v Bucknell* (1831) 2 B & Ad 278, following *Co Litt* 352b; *Com Dig*, Estoppel (E); *Hermitage v Tomkins* (1699) 1 Ld Raym 729; *Pargeter v Harris* (1845) 7 QB 708; *Saunders v Merryweather* (1865) 3 H & C 902.

<sup>2</sup> *Jolly v Arbuthnot* (1859) 4 De G & J 224, followed in *Morton v Woods* (1869) LR 4 QB 293, Ex Ch; and see PARA 1039 post.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1018. No estoppel in favour of person knowing the circumstances.

**1018. No estoppel in favour of person knowing the circumstances.**

A person who knows the truth of the circumstances under which a deed has been executed, whether he has acquired that knowledge personally or through his agent, cannot set up an estoppel in his own favour if the circumstances were such as to make the deed invalid between the original parties<sup>1</sup>.

<sup>1</sup> *Burgis v Constantine* [1908] 2 KB 484 at 492, CA per Gorell Barnes P (quoting and approving Bigham J in the court below), where the circumstances were such as to make the deed invalid between the original parties; cf *Health v Crealock* (1873) LR 18 Eq 215 at 242; on appeal (1874) 10 Ch App 22. In any case, it is doubtful if a third party can set up an estoppel upon an invalid deed. If a person consents to join in a conveyance, being told generally there are objections, it must be taken that he has inquired into the nature of the objections and he cannot afterwards raise any question as to the extent of his information: see *Marquis of Cholmondeley v Lord Clinton* (1817) 2 Mer 171 at 355 per Grant MR, following *Lord Braybroke v Inskip* (1803) 8 Ves 417 at 431; and cf *Pilcher v Rawlins* (1872) 7 Ch App 259. This is properly part of the doctrine of notice.



Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1019. Estoppel against principal.

**1019. Estoppel against principal.**

Estoppel may be set up against a principal by which he is estopped from repudiating alterations made by his agent in a deed subsequent to its execution by the principal, if in consequence of the alterations the person setting up the estoppel has altered his position<sup>1</sup>.

<sup>1</sup> *Holdsworth v Lancashire and Yorkshire Insurance Co* (1907) 23 TLR 521; cf *Mitas v Hyams* [1951] 2 TLR 1215, CA.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1020. Persons bound by the estoppel.

### **1020. Persons bound by the estoppel.**

Estoppel binds only the parties to the deed containing the representation relied upon (including their privies<sup>1</sup>), or one or other of them, and does not affect the rights of strangers to the deed<sup>2</sup>. For this reason it is said that estoppel by deed ought to be mutual or reciprocal. A person may be a stranger to his own deed when he is suing or being sued, not in his own right, but in right of another<sup>3</sup>.

When a recital is intended to be a statement which all the parties to a deed have mutually agreed to admit as true, it is an estoppel upon all; but, when it is intended to be the statement of one party only, the estoppel is confined to that party. The intention is a question of construction in each case<sup>4</sup>.

It has been said that there is no estoppel by deed as against the Crown<sup>5</sup>, at least where the estoppel arises through its own letters patent<sup>6</sup>, but the position is not entirely clear and is discussed in more detail elsewhere in this work<sup>7</sup>.

1 As to privies see PARA 999 ante; Co Litt 352a, b; *Doe d Marchant v Errington* (1839) 6 Bing NC 79. A person claiming under a grantor is estopped from taking advantage of a technical defect in the grant: *Howard v Earl of Shrewsbury* (1867) LR 3 Eq 218; on appeal 2 Ch App 760. A person who executes a memorandum indorsed on a deed may be bound by recitals in the deed as if he were a party: *Doe d Gaisford v Stone* (1846) 3 CB 176.

2 *Mowatt v Castle Steel and Iron Works Co* (1886) 34 ChD 58 at 63, CA; *Doe d Marchant v Errington* (1839) 6 Bing NC 79; *Gaunt v Wainman* (1836) 3 Bing NC 69; *Cracknall v Janson* (1879) 11 ChD 1 at 11, CA, per Fry J; *Woodward v Battersea Borough Council* (1911) 104 LT 51.

3 *Metters v Brown* (1863) 1 H & C 686 at 693, following *Doe d Hornby v Glenn* (1834) 1 Ad & El 49 (an agreement entered into by an executor de so tort did not bind him after he had become rightful administrator).

4 *Carpenter v Buller* (1841) 8 M & W 209; *Young v Raincock* (1849) 7 CB 310; *Stroughill v Buck* (1850) 14 QB 781; *Wiles v Woodward* (1850) 5 Exch 557; *Greer v Kettle* [1938] AC 156, [1937] 4 All ER 396, HL. The good sense of the much quoted dictum of Co Litt 47b and 352a, that estoppel by deed should be mutual (see PARA 1012 ante), is questioned in Bac Abr Leases and Terms for Years (O), on the ground that an estoppel may arise upon a deed poll, and it is clearly inconsistent with the proposition in the text. The dictum serves, perhaps, to express the principle that there can be no operation of estoppel by deed collateral to the operation of the deed itself: see PARA 1028 post.

5 See *Coke's Case* (1623) Godb 289 at 299; *A-G to Prince of Wales v Collom* [1916] 2 KB 193 at 204 per Atkin J.

6 See Vin Abr, Estoppel, N 3, N 16.

7 See CONSTITUTIONAL LAW AND HUMAN RIGHTS vol 8(2) (Reissue) PARA 385.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1021. Effect of fraud, force or forgery.

### **1021. Effect of fraud, force or forgery.**

No estoppel can arise upon a deed in so far as it is void on the ground that it was obtained by fraud, force or other foul practice, or is a forgery<sup>1</sup>. Upon the principle, however, that no one may allege his own fraud in order to invalidate his own deed, it follows that a person will be precluded from resisting an estoppel arising from admissions in a deed he has fraudulently obtained<sup>2</sup>.

If there is a false representation respecting the contents of a deed, a person may in certain circumstances still be estopped as between himself and a person who innocently acts upon the faith of its being valid, and who accepts an estate under it<sup>3</sup>.

1 2 Bl Com (14th Edn) 309; *Norfolk's Case* (1667) Hard 464; *Mitchel v Reynolds* (1711) 1 P Wms 181; *Ruben v Great Fingall Consolidated* [1906] AC 439 at 446, HL; cf *Hawker v Compton* (1922) 8 TC 306; *Dickenson v Gross* (1927) 137 LT 351; *Greer v Kettle* [1938] AC 156 at 171, [1937] 4 All ER 396 at 404, HL.

2 *Montefiori v Montefiori* (1762) 1 Wm Bl 363; *Doe d Roberts v Roberts* (1819) 2 B & Ald 367; *Gascoigne v Gascoigne* [1918] 1 KB 223.

3 *Howatson v Webb* [1908] 1 Ch 1, CA; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 69. As to the avoidance of deeds and the plea of non est factum generally see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 68-73.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1022. Effect of illegality.

### 1022. Effect of illegality.

A difficult problem occurs in connection with deeds which are illegal or made for an illegal purpose, for in certain cases such deeds may be set aside<sup>1</sup> and any estoppel arising therein will be opened<sup>2</sup>. Moreover, where a statement is made in a deed for the purpose of concealing an illegal contract, the whole matter is opened on the ground that persons cannot be allowed to escape from the law by making a false statement<sup>3</sup>.

Consequently under the Bills of Sale Acts<sup>4</sup> there can be no estoppel so as to prevent a person asking the court to go behind the form of the instrument in order to discover the real nature of the transaction<sup>5</sup>.

A party to a deed which is declared to be void by statute on general grounds of public policy is not precluded from setting up the invalidity of the deed by having assented to and taken advantage of it<sup>6</sup>, although it would appear that, if a deed is bad on the ground that it has been executed to effect a purpose made illegal by statute, it may not, as between the parties, be competent to either party to set up its invalidity, on the principle that the policy of the law is not to make contracts void to a greater extent than the mischief to be remedied renders necessary. Estoppel, it may be presumed, continues as an incident of only so much of the deed as the law preserves<sup>7</sup>.

1 *Collins v Blantern* (1767) 2 Wils 341; and see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 73.

2 *Fairtitle d Mytton v Gilbert* (1787) 2 Term Rep 169 at 171; *Stratford and Moreton Rly Co v Stratton* (1831) 2 B & Ad 518 at 526; *Hill v Manchester and Salford Water Works Co* (1831) 2 B & Ad 544 at 553; *Doe d Preece v Howells* (1831) 2 B & Ad 744; *Doe d Chandler v Ford* (1835) 3 Ad & El 649; *Prole v Wiggins* (1836) 3 Bing NC 230; *Doe d Levy v Horne* (1842) 3 QB 757 at 766.

3 *Doe d Williams v Lloyd* (1839) 5 Bing NC 741; *Horton v Westminster Improvement Comrs* (1852) 7 Exch 780; *Re Holland, Gregg v Holland* [1901] 2 Ch 145 at 158-159 per Farwell J; revsd on other grounds [1902] 2 Ch 360, CA.

4 See FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 1681-1682.

5 *Madell v Thomas & Co* [1891] 1 QB 230, CA; cf *Bittlestone v Cooke* (1856) 25 LJQB 281; *Kevan v Mawson* (1871) 24 LT 395. See also FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARAS 1641, 1692-1694; but cf FINANCIAL SERVICES AND INSTITUTIONS vol 50 (2008) PARA 1698 the text and note 4.

6 *Canterbury Corp v Cooper* (1909) 100 LT 597, CA (arrangement for surrender of lease and grant of new lease by corporation; new lease invalid owing to non-compliance with statutory restriction on alienation of corporate land; action by corporation for possession; no estoppel); *Re A Bankruptcy Notice* [1924] 2 Ch 76 at 96-98, CA, per Atkin LJ; and see *Re Wilson, ex p Jones* (1916) 85 LJBK 1408, CA; *Huddersfield Fine Worsteds Ltd v Todd* (1925) 134 LT 82; and PARA 960 ante.

7 *Phillpotts v Phillpotts* (1850) 10 CB 85 at 97 per Jervis CJ, following *Bessey v Windham* (1844) 6 QB 166, approved by Watson B in *Bowed v Foster* (1858) 27 LJ Ex 262; cf *Burkinshaw v Nicolls* (1878) 3 App Cas 1004, HL (illegal issue of shares as fully paid up to a vendor by a limited company; company held to be estopped as against a subsequent innocent transferee from denying that the shares were fully paid up), explained, on the ground that the doctrine of that case was that an innocent party is to be protected, and is not to suffer by the misfeasance of others by whom he has been led into the transaction, in *Re Stapleford Colliery Co, Barrow's Case* (1880) 14 ChD 432 at 441, CA (illegal issue of shares for a consideration other than money; company, by issuing the shares as fully paid up, held not to be estopped as against holders who were aware of the illegality from saying that the shares were issued for other than a money consideration); *Hull Flax and Cotton Mill Co v Wellesley* (1860) 6 H & N 38; *Barrow Mutual Ship Insurance Co Ltd v Ashburner* (1885) 54 LJQB 377, CA.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1023. Effect of mistake.

### **1023. Effect of mistake.**

A mere mistake in a deed common to all parties which would give grounds for rectification, or on account of which no one has altered his position<sup>1</sup>, will not create an estoppel<sup>2</sup>. It must, however, be a genuine mistake<sup>3</sup>. What the court will hold to be a mistake so as to defeat an estoppel must depend upon the circumstances of each case. The reported cases do not afford any clear principle of distinction<sup>4</sup>.

1 There is, however, no general requirement of detrimental reliance for the operation of estoppel by deed: see PARA 1011 the text and note 7 ante. As to the requirement of detrimental reliance for the operation of estoppel by representation see PARA 1068 et seq post.

2 *Scholefield v Lockwood (No 2)* (1863) 33 LJ Ch 106 at 110 per Romilly MR (a case of mere clerical error, subsequently reversed, but not on this point); *Brooke v Haymes* (1868) LR 6 Eq 25 (a mistake of fact as to the amount of duty payable, common to all parties); *Greer v Kettle* [1938] AC 156 at 171, [1937] 4 All ER 396 at 404, HL; *Wilson v Wilson* [1969] 3 All ER 945, [1969] 1 WLR 1470 (beneficial ownership of joint purchasers declared in conveyance contrary to their mutual intention at the time of execution). As to rectification of deeds see MISTAKE vol 77 (2010) PARA 57 et seq.

3 See *Harding v Ambler* (1838) 3 M & W 279.

4 *Skipworth v Green* (1724) 8 Mod Rep 311; *Re Simpson, ex p Morgan* (1876) 2 ChD 72 at 93, CA; *Mellor v Walmesley* [1905] 2 Ch 164, CA, following *Roberts v Karr* (1809) 1 Taunt 495; and *Espley v Wilkes* (1872) LR 7 Exch 298. As to deeds entered into under a common mistake see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 71.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1024. Minors; corporations.

### **1024. Minors; corporations.**

There can be no estoppel by deed against a minor because a minor's deed is never good by way of estoppel<sup>1</sup>; and, although a minor may be sued upon a covenant by deed for necessities supplied to him<sup>2</sup>, the case must be treated exactly as if there had been no deed and the court must inquire whether the things supplied were in fact supplied and whether they were necessary<sup>3</sup>.

In favour of a purchaser in good faith for valuable consideration a deed is deemed to have been duly executed by a corporation aggregate if its seal is affixed thereto in the presence of and attested by its clerk, secretary or other permanent officer or his deputy, and a member of the board of directors, council or other governing body of the corporation; and, where a seal purporting to be the seal of a corporation has been affixed to a deed, attested by persons purporting to be persons holding such offices, the deed is deemed to have been executed in accordance with these requirements, and to have taken effect accordingly<sup>4</sup>.

1 *Smith v Low* (1739) 1 Atk 489 per Lord Hardwicke LC.

2 Necessaries include education suitable to the minor's prospects in life and so he may be liable for the payment of a premium which he has covenanted to pay under an apprenticeship deed: see *Walter v Everard* [1891] 2 QB 369, CA. See further CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 18 et seq.

3 *Cooper v Simmons* (1862) 7 H & N 707 at 719 per Martin B; followed in *Walter v Everard* [1891] 2 QB 369 at 373, CA, per Lord Esher MR.

4 See the Law of Property Act 1925 ss 74(1), (5), 205(1)(xxi); and DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 40-42; and as to the Law of Property Act 1925 s 74(1) see *Longman v Viscount Chelsea* (1989) 58 P & CR 189 at 199, [1989] 2 EGLR 242 at 246, CA, per Nourse LJ.

## **UPDATE**

### **1024 Minors; corporations**

TEXT AND NOTE 4--Now, in favour of such a purchaser, an instrument is deemed to have been duly executed by a corporation aggregate if a seal purporting to be the corporation's seal purports to be affixed to the instrument in the presence of and attested by two members of the board of directors, council or other governing body of the corporation, or one such member and the clerk, secretary or other permanent officer of the corporation or his deputy: 1925 Act s 74(1) (substituted by the Regulatory Reform (Execution of Deeds and Documents) Order 2005, SI 2005/1906). This applies in the case of an instrument purporting to have been executed by a corporation aggregate in the name or on behalf of another person whether or not that person is also a corporation aggregate: 1925 Act s 74(1A) (added by SI 2005/1906). For these purposes, a seal purports to be affixed in the presence of and attested by an officer of the corporation, in the case of an officer which is not an individual, if it is affixed in the presence of and attested by an individual authorised by the officer to attest on its behalf: 1925 Act s 74(1B) (added by SI 2005/1906).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1025. Receipt for consideration money.

**1025. Receipt for consideration money.**

A receipt for consideration money in the body of a deed or indorsed on it is not conclusive as between the parties that the money has in fact been paid, although it may, in the case of a conveyance, raise an estoppel in favour of a subsequent purchaser<sup>1</sup>.

<sup>1</sup> See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 224. See also *Davis v Stone* [1992] 2 EGLR 222, [1992] 41 EG 122, Leasehold Valuation Tribunal (landlord of block of flats sold freehold without first offering it to the tenants; purchase deed stated new landlord paid £4,500; on tenants' application under Landlord and Tenant Act 1987 s 13 (now as substituted: see LANDLORD AND TENANT vol 27(3) (2006 Reissue) PARAS 1776) to settle terms for their purchase of the freehold from the new landlord, he claimed that he had paid an additional sum to the vendor for which he should be compensated; held that he was estopped from denying that the consideration payable was the sum actually stated).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1026. Covenant as to power to convey.

**1026. Covenant as to power to convey.**

A mere covenant that a person has the power to convey an estate is not sufficient to raise an estoppel so as to prevent him from denying that he was seised in fee or had the legal estate<sup>1</sup>.

<sup>1</sup> See the cases cited in PARA 1016 note 3 ante. As to covenants running with estates by estoppel see *Spencer's Case* (1583) 5 Co Rep 16a; the Law of Property Act 1925 ss 78, 79; and EQUITY vol 16(2) (Reissue) PARA 618; LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARAS 559, 566; and as to how far a person is bound by covenants in a deed see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 63 et seq.



Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1027. Condition in bond.

**1027. Condition in bond.**

In all cases where the condition of a bond has reference to any particular thing the obligor is estopped from saying that there is no such thing<sup>1</sup>, but the estoppel must be 'certain to every intent'<sup>2</sup>.

1 See DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARAS 115, 125.

2 *Kepp v Wiggett* (1850) 10 CB 35 at 53 per Williams J.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(2) ESTOPPEL ARISING FROM A STATEMENT OF FACT IN A DEED/1028. No estoppel where claim not founded on deed.

**1028. No estoppel where claim not founded on deed.**

There can be no estoppel arising out of a deed where the claim is not founded on the deed, but is wholly collateral to it<sup>1</sup>. In such cases the recitals in the deed, although certainly evidence of the facts to which they relate, are not of so high and conclusive a nature as to admit of no contradictory proof, and evidence of the circumstances in which the admissions contained in the deed were made is receivable to show that the admission was inconsiderately made and not entitled to weight as proof of the fact it is used to establish<sup>2</sup>.

<sup>1</sup> *Carpenter v Buller* (1841) 8 M & W 209; *Carter v Carter* (1857) 3 K & J 617 at 645; *Fraser v Pendlebury* (1861) 31 LJCP 1; *Re Simpson, ex p Morgan* (1876) 2 ChD 72, CA; cf *Trinidad Asphalt Co v Coryat* [1896] AC 587 at 592, PC, per Lord Hobhouse. Where pecuniary legatees who had not received legacies in full executed a release to the trustees acknowledging receipt of legacies, it was held that they were not estopped from claiming the balance on the subsequent falling in of other funds: *Re Ghost's Trusts* (1883) 49 LT 588.

<sup>2</sup> *South Eastern Rly Co v Warton* (1861) 6 H & N 520 at 528; and as to the limits of estoppel for determining the amount of a constructive total loss under an insurance policy see *Burnand v Rodocanachi, Sons & Co* (1882) 7 App Cas 333, HL. As to the circumstances under which a cancelled deed may be used as evidence of the facts to which it relates see DEEDS AND OTHER INSTRUMENTS vol 13 (2007 Reissue) PARA 79.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1029. In general.

### **(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED**

#### **1029. In general.**

Just as the parties to a deed are estopped from denying statements of fact they have made in it<sup>1</sup>, so too they are prevented from denying the existence of a relationship established by deed, in particular the grant of a legal estate in land such as a lease or mortgage<sup>2</sup>. This principle has been described as 'the fundamental principle of the common law which precludes a grantor from disputing the validity or effect of his own grant'<sup>3</sup>.

1 See PARA 1014 et seq ante.

2 See PARA 1030 et seq post.

3 *First National Bank plc v Thompson*[1996] Ch 231 at 237, [1996] 1 All ER 140 at 145, CA, per Millett LJ.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1030. Estoppel by accepting grant of lease or mortgage of land.

### **1030. Estoppel by accepting grant of lease or mortgage of land.**

A lease or mortgage of land is created by estoppel when the grantor or landlord has no legal estate or interest in the land at the time of the grant<sup>1</sup>; and, although a title by estoppel, such as the landlord or grantor in this case possesses, is good only against the person estopped by his own deed, namely the tenant or the grantee, yet as against the person estopped it has all the elements of a real title<sup>2</sup>. It has been judicially stated that 'tenancy by estoppel' does not, however, describe an agreement which would not otherwise be a lease or tenancy<sup>3</sup> but which is treated as being one by virtue of an estoppel. The estoppel arises when one or other of the parties wants to deny one of the ordinary incidents or obligations of the tenancy on the ground that the landlord had no legal estate; and the basis of the estoppel is that having entered into an agreement which constitutes a lease or tenancy, he cannot repudiate that incident or obligation. Thus on this analysis it is the fact that the agreement between the parties constitutes a tenancy that gives rise to an estoppel and not the other way round<sup>4</sup>.

A tenant who holds under a lease by a deed between parties is estopped from disputing his landlord's title<sup>5</sup> both during and after the expiration of his term unless he has been evicted by title paramount<sup>6</sup>. The estoppel continues after the tenant has gone out of possession with respect to breaches of covenant committed during the lease<sup>7</sup>.

1 Bac Abr, Leases and Terms for Years (O); *Walton v Waterhouse* (1672) 2 Wms Saund 415c, notes; *Doe d Bristow v Pegge* (1785) 1 Term Rep 758n at 760n per Lord Mansfield CJ; *Cuthbertson v Irving* (1859) 4 H & N 742 at 757; affd (1860) 6 H & N 135; *Universal Permanent Building Society v Cooke* [1952] Ch 95 at 101, [1951] 2 All ER 893 at 896-897, CA, per Sir Raymond Evershed MR.

2 *Davis v Bank of England* (1824) 2 Bing 393 at 407; *Bensley v Burden* (1830) 8 LJOS Ch 85; *Richards v Johnston* (1859) 4 H & N 660; *Richards v Jenkins* (1887) 18 QBD 451 at 456, CA; *Bank of England v Cutler* [1908] 2 KB 208 at 234, CA; and see *First National Bank plc v Thompson* [1996] Ch 231 at 237, [1996] 1 All ER 140 at 145, CA, per Millett LJ.

3 Eg an agreement which does not grant exclusive possession (a licence). A 'lease' or 'tenancy' is a contractually binding agreement, not referable to any other relationship between the parties, by which one person gives another the right to exclusive occupation of land for a fixed or renewable period or periods of time, usually in return for a periodic payment in money. An agreement having these characteristics creates a relationship of landlord and tenant to which the common law or statute may then attach various incidents: see *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406 at 413, [1999] 3 All ER 481 at 485-486, HL, per Lord Hoffmann; and see eg *Street v Mountford* [1985] AC 809, [1985] 2 All ER 289, HL; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 6 et seq. As to estoppel between licensor and licensee see PARA 1040 post.

4 See *Bruton v London and Quadrant Housing Trust* [2000] 1 AC 406 at 415-416, [1999] 3 All ER 481 at 488, HL, per Lord Hoffmann.

5 See PARA 1031 post. As to the position of the landlord's assignee see PARA 1036 post.

6 *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, [1977] 2 All ER 293, CA; and see *WG Clark (Properties) Ltd v Dupré Properties Ltd* [1992] Ch 297, [1992] 1 All ER 596; *Sadiq v Hussain* [1997] NPC 19, 73 P & CR D44, CA.

7 *Industrial Properties (Barton Hill) Ltd v Associated Electrical Industries Ltd* [1977] QB 580, [1977] 2 All ER 293, CA.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1031. Estoppel binds landlord and tenant.

### **1031. Estoppel binds landlord and tenant.**

It follows from the previous paragraph<sup>1</sup> that the relationship of landlord and tenant may be brought into being even though the landlord has no title to the land of which he has purported to create a tenancy. The relationship so brought into being may subsist for the purposes of the Rent Acts<sup>2</sup>.

The doctrine of estoppel between landlord and tenant is not, however, confined to leases by deed<sup>3</sup>. Where the relationship arises otherwise than by deed, it may be regarded as a form of estoppel in pais as that term is used in this title<sup>4</sup>.

1 See PARA 1030 ante.

2 *Stratford v Syrett* [1958] 1 QB 107, [1957] 3 All ER 363, CA (beneficiary under trust for sale with no statutory power of leasing capable of being landlord under tenancy by estoppel for purposes of Rent Acts). See also *Keen v Holland* [1984] 1 All ER 75, [1984] 1 WLR 251, CA (agreement for agricultural holding made on basis that protected tenancy would not be granted; tenant not estopped from relying on statutory protection).

3 *Phipps v Sculthorpe* (1817) 1 B & Ald 50; *Doe d Jackson v Wilkinson* (1824) 3 B & C 413. The extension by analogy of the doctrine that a tenant may not dispute his landlord's title to written and oral tenancies has been described as arising by intendment of law from the relationship of landlord and tenant (see *Morton v Woods* (1869) LR 4 QB 293 at 304, Ex Ch per Kelly CB, citing *Jolly v Arbutnot* (1859) 4 De G & J 224), and may not operate by estoppel strictly so called in cases where there is no writing, since the tenant's belief in his landlord's ability to grant the term is not essential. He may know or have notice of a defect in his landlord's title and yet be precluded, once he has entered and paid rent, from denying it (see *Morton v Woods* supra) and thus one of the essential features of common law estoppel by representation, namely that of reliance on the truth of the representation made (see PARA 1072 post), may be lacking (see *Edward H Lewis & Son Ltd v Morelli* [1948] 2 All ER 1021 at 1024, CA per Harman J). See also *Bell v General Accident Fire & Life Assurance Corp'n Ltd* [1998] 1 EGLR 69, [1998] 17 EG 144, CA; *Newham London Borough Council v Phillips* [1998] 1 FLR 613, (1997) 30 HLR 859, CA.

4 As to estoppel in pais see PARA 955 ante, para 1043 et seq post.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1032. Estoppel by entry into possession.

### 1032. Estoppel by entry into possession.

In general a tenant is estopped from disputing the title at the time of the demise of the landlord by whom he has been let into possession<sup>1</sup>, but this estoppel has no application even while the tenancy exists when the question of title arises between the parties, not in the relationship of landlord and tenant, but of vendor and purchaser<sup>2</sup>. The doctrine of estoppel which operates between landlord and tenant applies to tenancies from year to year, at will, or on sufferance, as well as to leases for years<sup>3</sup>; and anyone holding under a tenant, or defending as landlord in possession proceedings, is bound by it<sup>4</sup>.

Similarly, the landlord is estopped from repudiating a lease under which possession has been given or a tenancy which he has acknowledged, and the assignee of the landlord's interest is estopped from denying anything which the landlord is estopped from denying<sup>5</sup>. Where the landlord subsequently acquires a title to the land he has purported to demise, the lease takes effect in interest and the estoppel is said to be fed<sup>6</sup>.

When, however, a lease is void by statute, a person entering under the lease enters without any title whatever, and there is nothing by way of estoppel to prevent the running of time in his favour so as to bar the landlord's title<sup>7</sup>.

1 *Rawlins' Case* (1587) Jenk 254; *Syllivan v Stradling* (1764) 2 Wils 208; *Friend v Eastabrook* (1777) 2 Wm Bl 1152; *Veale v Warner* (1669) 1 Saund 323 at 326 note (f), 1 Wms Saund 575 at 580; *Cooke v Loxley* (1792) 5 Term Rep 4; *Barwick d Richmond (Yorks) Corpn v Thompson* (1798) 7 Term Rep 488; *Doe d Knight v Lady Smythe* (1815) 4 M & S 347; *Parry v House* (1817) Holt NP 489; *Alchorne v Gomme* (1824) 2 Bing 54; *A-G v Lord Hotham* (1823) Turn & R 209 at 219 (affd (1827) 3 Russ 415); *Fleming v Gooding* (1834) 10 Bing 549; *Cooper v Blandy* (1834) 1 Bing NC 45; *Doe d Earl Manvers v Mizem* (1837) 2 Mood & R 56; *Doe d Tresidder v Tresidder* (1841) 10 LQB 160; *Delaney v Fox* (1857) 2 CBNS 768 at 774; *Cuthbertson v Irving* (1859) 4 H & N 742 at 757 per Martin B (affd (1860) 6 H & N 135, Ex Ch); *Duke v Ashby* (1862) 7 H & N 600; *Serjeant v Nash, Field & Co* [1903] 2 KB 304 at 312, CA; *Bell v General Accident Fire & Life Assurance Corpn Ltd* [1998] 1 EGLR 69, [1998] 17 EG 144, CA. In *Nesbitt v Mablethorpe UDC* [1917] 2 KB 568 at 579 it was assumed, without deciding, that the tenancy of a few yards of ground estops a tenant from denying his landlord's title to the surrounding acres held under the same title or claim of title. The substance of this paragraph in a previous edition of this work (down to the text to note 5 infra) was approved by Cohen LJ in *Mackley v Nutting* [1949] 2 KB 55 at 62, [1949] 1 All ER 413 at 416, CA.

2 *Nesbitt v Mablethorpe UDC* [1917] 2 KB 568.

3 *Doe d Bailey v Foster* (1846) 3 CB 215 at 229 per Cresswell J, following *Doe d Johnson v Baytup* (1835) 3 Ad & El 188. Where a person who had possession but no title let by parol to the defendant for two years, and within that period assigned by deed to the plaintiff who, after that period, brought a possession action against the defendant, it was held that the defendant was estopped from denying his landlord's title: *Ward v Ryan* (1875) 10 CL 17, Ex Ch; and see *Doe d Biddle v Abrahams* (1816) 1 Stark 305. As to the replacement in civil proceedings of the terms 'plaintiff' and 'action' by the terms 'claimant' and 'claim' see CIVIL PROCEDURE vol 11 (2009) PARA 18.

4 *Palmer v Ekins* (1728) 2 Ld Raym 1550; *Taylor v Needham* (1810) 2 Taunt 278 at 282; *Doe d Knight v Lady Smythe* (1815) 4 M & S 347; *Doe d Manton v Austin* (1832) 9 Bing 41; *Doe d Bullen v Mills* (1834) 2 Ad & El 17; *Doe d Earl Manvers v Mizem* (1837) 2 Mood & R 56; *Doe d Willis v Birchmore* (1839) 9 Ad & El 662; *Doe d Earl Spencer v Beckett* (1843) 4 QB 601; *Doe v Challis* (1851) 17 QB 166 at 168 per Coleridge J; *London and North Western Ry Co v West* (1867) LR 2 CP 553; cf *Williams v Heales* (1874) LR 9 CP 177 and *Stratford-upon-Avon Corpn v Parker* [1914] 2 KB 562 at 566-567, 569 (position of executor de son tort); *Rodenhurst Estates Ltd v WH Barnes Ltd* [1936] 2 All ER 3, CA (assignment by estoppel).

5 This is an example of the dictum that estoppels must be mutual and reciprocal: Co Litt 47b, 352a; and as to whether a lease by estoppel can be created by deed poll see Bac Abr, Leases and Terms for Years (O) and

PARA 1014 note 1 ante; *Webb v Austin* (1844) 7 Man & G 701 at 724; *Cuthbertson v Irving* (1860) 6 H & N 135, Ex Ch; *Weller v Spiers* (1872) 26 LT 866 at 867 per Cockburn CJ; *Mackley v Nutting* [1949] 2 KB 55 at 62, [1949] 1 All ER 413 at 416-417, CA, per Cohen LJ; and cf *Darlington v Pritchard* (1842) 4 Man & G 783 at 793 per Tindal CJ; *Green v James* (1840) 6 M & W 656 at 660 (in argument) and at 662 (judgment per Alderson B). Cf also *Doe d Lord Downe v Thompson*, *Lord Downe v Thompson* (1847) 9 QB 1037 (where a lease was granted by a mortgagor in such a way as to be good only by estoppel, the mortgagee's assignee, although he received rent from the tenant, was not bound by the estoppel 'as he derived his estate from persons who were not privies to nor in any way estopped by the lease'); *Doe d Prior v Ongley* (1850) 10 CB 25; and see *Lever Finance Ltd v Trustee of Property of Needleman* [1956] Ch 375 at 382, [1956] 2 All ER 378 at 382-383 per Harman J (receipt of rent by a receiver appointed by the mortgagee under the Law of Property Act 1925 created no tenancy by estoppel against the mortgagee since by that Act the receiver is made the agent of the mortgagor not of the mortgagee). See also LANDLORD AND TENANT.

6 See PARA 1033 post. Where a contractual tenancy was purported to have been created between the landlord and the widow of a deceased contractual tenant but at the time of the purported creation the legal estate was outstanding in the President of the then Probate Division through the widow's failure, as personal representative, to take out letters of administration, on her subsequent death the right to rely on the estoppel was held to pass to her daughter as personal representative and to be converted into a tenancy when notice to quit was served on the President: see *Mackley v Nutting* [1949] 2 KB 55, [1949] 1 All ER 413, CA; *Whitmore v Lambert* [1955] 2 All ER 147, [1955] 1 WLR 495, CA.

7 *President and Governors of Magdalen Hospital v Knotts* (1879) 4 App Cas 324, HL (decided under the Real Property Limitation Act 1833 s 2 (repealed): see now the Limitation Act 1980 s 15, Sch 1 (as amended); and LIMITATION PERIODS). As to adverse possession of registered land see now the Land Registration Act 2002 Pt 9 (ss 96-98, Sch 6); *Land Registration for the Twenty-First Century, a Conveyancing Revolution* (Law Com no 271) (2001) PARA 14.6; and LAND REGISTRATION.

According to Bac Abr, Leases and Terms for Years (O), the doctrine of estoppel does not apply to Crown leases 'because the King cannot be estopped, for it cannot be presumed the King would do wrong to any person, and therefore being deceived in his grant makes it absolutely void': see *A-G to Prince of Wales v Collom* [1916] 2 KB 193 at 204; and PARA 1020 the text and notes 5-7 ante.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1033. Subsequent acquisition of title by grantor or landlord.

### 1033. Subsequent acquisition of title by grantor or landlord.

Where the grantor or landlord subsequently acquires a legal title to the premises which he has purported to demise, the legal estate or interest is said to feed the estoppel, and the grant or the lease then takes effect in interest and not by estoppel<sup>1</sup>; but the grantor or landlord is estopped from saying that he had no interest at the time of the grant or lease<sup>2</sup>. The doctrine of feeding the estoppel operates without the need for a clear and unambiguous recital of seisin in the grantor<sup>3</sup>; however, it appears that when a mortgage by estoppel is fed by the mortgagor's acquisition of legal title to the property, the resulting legal mortgage will not bind a bona fide purchase for value without notice unless it was created by a deed containing an express recital of the mortgagor's title<sup>4</sup>.

Where a person who has no legal interest in premises purports to grant a tenancy and subsequently acquires the legal estate, the acquisition feeds the estoppel and the tenancy by estoppel becomes a legal estate but it does not take priority over a mortgage created after the acquisition where the legal estate would not have been acquired but for the mortgage<sup>5</sup>.

1 Co Litt 47b; *Webb v Austin* (1844) 7 Man & G 701 at 724 per Tindal CJ (followed in *Cuthbertson v Irving* (1859) 4 H & N 742 at 754 per Martin B); *Booth v Alcock* (1873) 8 Ch App 663 at 667; *Rowbotham v Wilson* (1860) 8 HL Cas 348 at 364; *Poultton v Moore* [1915] 1 KB 400 at 415, CA; *Rajapakse v Fernando* [1920] AC 892 at 897, PC; *Fernando v Gunatillaka* [1921] 2 AC 357 at 366, PC; *Mackley v Nutting* [1949] 2 KB 55, [1949] 1 All ER 413, CA (the decision of the Court of Appeal on this point does not seem to be affected by *Moodie v Hosegood* [1952] AC 61, [1951] 2 All ER 582, HL). See also *Universal Permanent Building Society v Cooke* [1952] Ch 95 at 101-102, [1951] 2 All ER 893 at 896-897, CA (where Sir Raymond Evershed MR considered that the doctrine of feeding the estoppel was not excluded when the only right the landlord had was an equitable estate or interest); *Rust v Goodale* [1957] Ch 33, [1956] 3 All ER 373; *Cumberland Court (Brighton) Ltd v Taylor* [1964] Ch 29, [1963] 2 All ER 536 (where, after a conveyance of land recited to be unincumbered, the vendor took a transfer of an outstanding legal charge on the land, the transfer fed the estoppel, although no legal estate was outstanding, so as to bar the vendor from exercising the rights of a legal chargee); *Rowbotham v Wilson* (1857) 8 E & B 123 at 145, Ex Ch; and see EASEMENTS AND PROFITS A PRENDRE vol 16(2) (Reissue) PARA 54. In *Keate v Phillips* (1881) 18 ChD 560 at 577, however, this doctrine was not allowed to operate on a fraudulent conveyance by a trustee, so as to defeat the beneficiary's interest. Cf the doctrine of *Noel v Bewley* (1829) 3 Sim 103 at 116 per Shadwell V-C ('if a person has conveyed a defective title and he afterwards acquires a good title, this court will make that good title available to make the conveyance effectual') (followed and applied in *Re Hoffe's Estate Act 1885* (1900) 82 LT 556; *Re Bridgwater's Settlement*, *Partridge v Ward* [1910] 2 Ch 342; *Gresham Life Assurance Society v Crowther* [1914] 2 Ch 219 (affd [1915] 1 Ch 214, CA); *Re Harper's Settlement*, *Williams v Harper* [1919] 1 Ch 270); cf *Smith v Baker* (1842) 1 Y & C Ch Cas 223. The principle stated in *Noel v Bewley* supra is not affected by the fact that the case was disapproved in *Smith v Osborne* (1857) 6 HL Cas 375. The case was disapproved only because the right principle was misapplied to the particular facts: *Re Harper's Settlement*, *Williams v Harper* supra at 275.

2 *Hayne v Maltby* (1789) 3 Term Rep 438; *Rowbotham v Wilson* (1857) 8 E & B 123 at 145, Ex Ch per Watson B; *General Finance, Mortgage and Discount Co v Liberator Permanent Benefit Building Society* (1878) 10 ChD 15; *Hamill v Murphy* (1883) 12 LR Ir 400. In the case of a conveyance by a contingent remainderman the happening of the contingency feeds the estoppel: *Doe d Christmas v Oliver* (1829) 5 Man & Ry KB 202; *Health v Crealock* (1873) LR 18 Eq 215; on appeal (1874) 10 Ch App 22. As to the application of the principle to mortgagor and mortgagee see *Right d Jefferys v Bucknell* (1831) 2 B & Ad 278; *Doe v Ogle v Vickers* (1836) 4 Ad & El 782; *Doe v Levy v Horne* (1842) 3 QB 757.

3 *First National Bank plc v Thompson* [1996] Ch 231, [1996] 1 All ER 140, CA.

4 See *First National Bank plc v Thompson* [1996] Ch 231 at 239-240, [1996] 1 All ER 140 at 147-148, CA, per Millett LJ. As to mortgages by estoppel see also MORTGAGE vol 77 (2010) PARA 193.

5 *Abbey National Building Society v Cann* [1991] 1 AC 56, [1990] 1 All ER 1085, HL (there is no *scintilla temporis* in which the lease can be carved from the freehold before the mortgage takes effect).





Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1034. Grant or lease of interest larger than grantor's estate.

### **1034. Grant or lease of interest larger than grantor's estate.**

When the grantor or landlord has some legal estate or interest in the land, but purports to grant or to lease a larger estate or interest than he has, the grantee or the tenant does not hold by estoppel, for an estate or interest passed, and his tenure is of that interest, whatever it may be; and a tenant is not estopped at a date subsequent to the creation of the lease from proving that the landlord's title has determined, nor a grantee that the grantor's estate or interest has ceased in order to establish a title by adverse possession<sup>1</sup>.

This doctrine applies only to the duration of the estate and not to its quantity; where a person makes a lease professing to deal with the whole of an estate when in reality he can only deal with a part, this fact does not release the tenant from the estoppel against denying his title in respect of that part<sup>2</sup>.

1 Co Litt 45a; *Walton v Waterhouse* (1672) 2 Wms Saund 415c, notes; *Treport's Case* (1594) 6 Co Rep 14b; *Rawlyns' Case* (1587) Jenk 254 *Doe d Higginbotham v Barton* (1840) 11 Ad & El 307; *Serjeant v Nash, Field & Co* [1903] 2 KB 304 at 312, CA, per Collins MR; *Universal Permanent Building Society v Cooke* [1952] Ch 95 at 101-102, [1951] 2 All ER 893 at 896-897, CA per Sir Raymond Evershed MR, commenting on *Cuthbertson v Irving* (1859) 4 H & N 742 at 757; affd (1860) 6 H & N 135, Ex Ch. Cf *Neave v Moss* (1823) 1 Bing 360; *Alchorne v Gomme* (1824) 2 Bing 54; *Fenner v Duplock* (1824) 2 Bing 10; *Doe d Strode v Seaton* (1835) 2 Cr M & R 728; *Beer v Beer* (1852) 12 CB 60 at 81; *Delaney v Fox* (1857) 2 CBNS 768 at 774; *Langford v Selmes* (1857) 3 K & J 220. See also PARA 1035 post.

As to adverse possession of registered land see now the Land Registration Act 2002 Pt 9 (ss 96-98, Sch 6); *Land Registration for the Twenty-First Century, a Conveyancing Revolution* (Law Com no 271) (2001) PARA 14.6; and LAND REGISTRATION.

2 *Weeks v Birch* (1893) 69 LT 759 at 761 per Charles J; and see *Williams v Burrell* (1845) 1 CB 402 at 433. Tenants in common having several and distinct estates could not make a joint lease of the whole estate, but such a lease was taken to be the lease of each for his respective share, and the crossconfirmation of each for the other's part with no estoppel on either part: *Beer v Beer* (1852) 12 CB 60 at 81 per Williams J, quoting Comyn's Landlord and Tenant 22, following the authorities there recited. Tenancy in common in a legal estate can, however, no longer be created: see the Law of Property Act 1925 s 34 (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 211. As to joint tenancies see s 36 (as amended); and REAL PROPERTY vol 39(2) (Reissue) PARA 190 et seq.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1035. Tenant may show that landlord's title has determined.

### **1035. Tenant may show that landlord's title has determined.**

A tenant is not estopped either before or after the expiration of the term from showing that his landlord's title has determined<sup>1</sup>. If, however, the tenant came into possession under the landlord, the better opinion would seem to be that he must surrender possession or must have been evicted by a person having title paramount<sup>2</sup> before he disputes the landlord's title<sup>3</sup>, but it has been held that, unless he claims to be entitled to the premises in his own right<sup>4</sup>, it is not necessary that he should actually go out of possession<sup>5</sup>.

1 Co Litt 47b; *England d Syburn v Slade* (1792) 4 Term Rep 682; *Doe d Lowden v Watson* (1817) 2 Stark 230; *Fenner v Duplock* (1824) 2 Bing 10; *Hill v Saunders* (1825) 4 B & C 529; *Doe d Jackson v Ramsbotham* (1815) 3 M & S 516; *Doe d Higginbotham v Barton* (1840) 11 Ad & El 307; *Downs v Cooper* (1841) 2 QB 256 (where Lord Denman CJ further held that the landlord must also be estopped from treating as his tenant a person whom he has required to enter into that relation with another instead of himself); *Langford v Selmes* (1857) 3 K & J 220 at 229; *Gibbins v Buckland* (1863) 1 H & C 736; *Clark v Adie (No 2)* (1877) 2 App Cas 423 at 435, HL, per Lord Blackburn; *Wogan v Doyle* (1883) 12 LR Ir 69; *Serjeant v Nash, Field & Co* [1903] 2 KB 304 at 312, CA. As to the nature of leases by estoppel see PARAS 1030-1033 ante.

2 See *Delaney v Fox* (1857) 2 CBNS 768 at 775-776 per Cockburn CJ, distinguishing *Watson v Lane* (1856) 11 Exch 769 and discussing *Poole Corp v Whitt* (1846) 15 M & W 571 (where it had been held that constructive eviction would be sufficient for this purpose).

3 *Doe d Knight v Lady Smythe* (1815) 4 M & S 347; *Bayley v Bradley* (1848) 5 CB 396 at 400 per Wilde CJ (in argument), commenting on Co Litt 47b; cf *Doe d Johnson v Baytup* (1835) 3 Ad & El 188; *Gibbins v Buckland* (1863) 1 H & C 736. To the contrary see *England d Syburn v Slade* (1792) 4 Term Rep 682. In *Balls v Westwood* (1809) 2 Camp 11, Lord Ellenborough CJ held that a person cannot show that his landlord's title has expired without solemnly renouncing possession, but subsequently in *Doe d Lowden v Watson* (1817) 2 Stark 230 he held that the defendant in an action of ejectment might show an alteration in his landlord's title. See also *Claridge v Mackenzie* (1842) 4 Man & G 143 at 152; *Anon* (1505) Keil 65; *Knight v Clarke* (1885) 15 QBD 294, CA (a writ of possession would be granted to a landlord against a tenant in an action of ejectment, even though the landlord's title had expired before the trial of the action, unless the defendant could show affirmatively that it would be unjust and futile to issue the writ), following *Gibbins v Buckland* supra; and cf *Doe d Bailiff and Burgesses of Clun v Clarke* (1809) Peake Add Cas 239. As to the position when the landlord had no title at the time of the grant of the lease see PARA 1030 ante.

4 *Bayley v Bradley* (1848) 5 CB 396 at 400 per Wilde CJ.

5 *Mountray v Collier* (1853) 1 E & B 630 at 636 per Coleridge J (new arrangement with person who really has the title to hold under him, equivalent to going out of possession); cf *Gibbins v Buckland* (1863) 1 H & C 736.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1036. Tenant disputing title of landlord's assignee.

### **1036. Tenant disputing title of landlord's assignee.**

Where the person claiming as landlord is not the person by whom the tenant was let into possession, evidence may be received to show that the relation of landlord and tenant does not in fact exist<sup>1</sup>. Thus, although an assignee of the landlord is to all intents and purposes in the same situation as the landlord, and takes the benefit of and is bound by a lease by estoppel, the tenant is not estopped from showing that the landlord had no such title as he could pass to the assignee, or that the person claiming to be the assignee is not in fact the true assignee<sup>2</sup>.

1 *Cornish v Searell* (1828) 8 B & C 471; *Claridge v Mackenzie* (1842) 4 Man & G 143; cf *Ford v Ager* (1863) 2 H & C 279. In *Fenner v Duplock* (1824) 2 Bing 10, it was held that a tenant who on the expiration of his term entered into a new tenancy with the original landlord, being ignorant of the fact that in the meantime the landlord's title had determined, was not estopped from subsequently disputing the landlord's title at the time of the fresh demise. It is not easy, however, to understand the principle upon which this decision was based. A tenant who attends a sale of the premises with knowledge of the conditions of sale and that the purchaser was declared is estopped from denying that the purchaser became landlord: *Barrett v Marshall* (1920) 54 ILT 214.

2 *Barwick d Richmond (Yorks) Corp v Thompson* (1798) 7 Term Rep 488; *Parker v Manning* (1798) 7 Term Rep 537; *Rennie v Robinson* (1823) 1 Bing 147; *Carvick v Blagrove* (1820) 4 Moore CP 303; *Doe d Colemere v Whitroe* (1822) Dow & Ry NP 1; *Seymour v Franco* (1828) 7 LJOSKB 18; *Jew v Wood* (1841) Cr & Ph 185; *Gouldsworth v Knights* (1843) 11 M & W 337 at 343; *Doe d Marlow v Wiggins* (1843) 4 QB 367 at 375; *Sturgeon v Wingfield* (1846) 15 M & W 224; *Cuthbertson v Irving* (1859) 4 H & N 742 at 757 per Martin B (assignment of a lease by a mortgagor in possession; affd (1860) 6 H & N 135, Ex Ch); *Weld v Baxter* (1856) 1 H & N 568, Ex Ch (after the death of a landlord who purported to demise as tenant in fee, it was held that the tenant was not estopped from showing that he was only a tenant for life).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1037. Estoppel by payment of rent.

### 1037. Estoppel by payment of rent.

Payment of rent is prima facie a recognition of the title of the person to whom it is paid<sup>1</sup>, and operates as an estoppel against the tenant if he disputes that title<sup>2</sup>. If the payment is to a person by whom the tenant was not let into possession, the tenant is not estopped by the payment from disputing the title of the person to whom the payment has been made<sup>3</sup>; he may show that rent was paid provisionally, for what it was worth<sup>4</sup>, or paid through a mistake<sup>5</sup>, or paid in consequence of a misrepresentation by the person receiving the rent<sup>6</sup>, but he must show a better title in someone else; and he is not allowed simply to impeach the title of the person to whom he has paid rent<sup>7</sup> unless he can show that the title of his landlord has determined<sup>8</sup>.

Where rent has been paid to a person not entitled to the reversion, the tenant is liable to pay it over again to the reversioner<sup>9</sup> unless the reversioner is estopped from claiming it, as, for example, where the payment has been made on his representation or on the representation of his agent as to the person authorised to receive it<sup>10</sup>.

1 *Doe d Jackson v Wilkinson* (1824) 3 B & C 413. Payment of rent does not, however, necessarily create a tenancy: *Strahan v Smith* (1827) 4 Bing 91; cf *Meredith v Gilpin* (1818) 6 Price 146. As to the elements of a lease or tenancy, as opposed to a licence, see PARA 1030 note 3 ante; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 6 et seq.

2 *Jump v Payne* (1899) 68 LQB 607.

3 *Williams v Bartholomew* (1798) 1 Bos & P 326 at 328 per Buller J; *Doe d Bailiff and Burgesses of Clun v Clarke* (1809) Peake Add Cas 239; *Rogers v Pitcher* (1815) 6 Taunt 202; *Gravenor v Woodhouse* (1822) 1 Bing 38 at 43; *Fenner v Duplock* (1824) 2 Bing 10 (where a new lease was taken from the original landlord, but the tenant was not estopped); *Gregory v Doidge* (1826) 3 Bing 474; *Cooper v Blandy* (1834) 1 Bing NC 45; *Waddilove v Barnett* (1836) 2 Bing NC 538; *Brook v Biggs* (1836) 2 Bing NC 572; *Doe d Harvey v Francis* (1837) 2 Mood & R 57; *Doe d Plevin v Brown* (1837) 7 Ad & El 447; *Hall v Butler* (1839) 10 Ad & El 204; *Doe d Higginbotham v Barton* (1840) 11 Ad & El 307 at 313 per Lord Denman CJ; *Jew v Wood* (1841) Cr & Ph 185 at 194 per Lord Cottenham LC; *Doe d Marlow v Wiggins* (1843) 4 QB 367; *Hitchings v Thompson* (1850) 5 Exch 50, as explained by Lord Cranworth in *A-G v Stephens* (1855) 6 De GM & G 111 at 141; and see also *A-G v Stephens* supra at 136; *Knight v Cox* (1856) 18 CB 645; *Carlton v Bowcock* (1884) 51 LT 659; *Serjeant v Nash, Field & Co* [1903] 2 KB 304, CA; *Jones v Stone* [1894] AC 122, PC. As to assignment by estoppel see PARA 1038 post.

4 *le paid de bene esse*: see *Serjeant v Nash, Field & Co* [1903] 2 KB 304, CA.

5 *Rogers v Pitcher* (1815) 6 Taunt 202; *Fenner v Duplock* (1824) 2 Bing 10; *Doe d Plevin v Brown* (1837) 7 Ad & El 447; *Gravenor v Woodhouse* (1822) 1 Bing 38; *Hall v Butler* (1839) 10 Ad & El 204; *Cooper v Blandy* (1834) 1 Bing NC 45; *Doe d Higginbotham v Barton* (1840) 11 Ad & El 307; *Hitchings v Thompson* (1850) 5 Exch 50.

6 *Hall v Butler* (1839) 10 Ad & El 204; *Carlton v Bowcock* (1884) 51 LT 659.

7 *Carlton v Bowcock* (1884) 51 LT 659; *Hindle v Hick Bros Manufacturing Co Ltd* [1947] 2 All ER 825, CA; cf *Cooper v Blandy* (1834) 1 Bing NC 45.

8 *National Westminster Bank Ltd v Hart* [1983] QB 773, [1983] 2 All ER 177, CA, following *Fenner v Duplock* (1824) 2 Bing 10 and *Serjeant v Nash Field & Co* [1903] 2 KB 304 at 312, CA, per Collins MR, as more appropriate than the admittedly conflicting line of authority cited in note 7 supra.

9 *Williams v Bartholomew* (1798) 1 Bos & P 326.

10 *White v Greenish* (1861) 11 CBNS 209. As to estoppel by representation generally see PARA 1052 et seq post; and as to the recovery of payments by claims for restitution see RESTITUTION vol 40(1) (2007 Reissue) PARA 1 et seq.



Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1038. Assignment by estoppel.

**1038. Assignment by estoppel.**

A person who has gone into possession and paid the rent reserved under the lease may be estopped from denying that he is an assignee of the lease, and thus liable on the covenants in it<sup>1</sup>, if the payment and possession amounted to a representation by that person that he was an assignee and the representation was intended to be acted on by the landlord<sup>2</sup>.

<sup>1</sup> *Williams v Heales* (1874) LR 9 CP 177; *Stratford-upon-Avon Corp'n v Parker* [1914] 2 KB 562; *Rodenhurst Estates Ltd v WH Barnes Ltd* [1936] 2 All ER 3, CA; and see *Doe d Hemmings v Durnford* (1832) 2 Cr & J 667; *Beale v Sanders* (1837) 3 Bing NC 850.

<sup>2</sup> *Official Trustee of Charity Lands v Ferriman Trust Ltd* [1937] 3 All ER 85; and see *Tichborne v Weir* (1892) 67 LT 735 at 737, CA; *Ashe v Hogan* [1920] 1 IR 159 at 164.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1039. Effect of submission to a distress.

### **1039. Effect of submission to a distress.**

Submission to a distress constitutes an acknowledgment of a tenancy. After distraining, the landlord cannot bring proceedings for possession for a cause accruing before the distress, and the occupier, if he does not replevy, is precluded from denying the landlord's title<sup>1</sup>. Payment of rent under threat of a distress, however, is not a conclusive admission of title in the distrainer<sup>2</sup>. Further, where a demise operates as an assignment of the landlord's term, so as to leave no reversion in the landlord, and consequently no right to distrain, the estoppel by which the tenant is precluded from denying his landlord's title does not prevent his denying the landlord's right to distrain<sup>3</sup>.

Where in a deed, by which the relation of landlord and tenant is created, the landlord's want of legal estate is apparent, the tenant is bound by the ordinary rule of estoppel between landlord and tenant, and cannot say that a distress is invalid on account of the want of the legal estate<sup>4</sup>. There is, however, no power of re-entry where it appears on the face of the lease that the landlord has no legal reversion<sup>5</sup>.

1 *Panton v Jones* (1813) 3 Camp 372; *Cooper v Blandy* (1834) 1 Bing NC 45.

2 *Knight v Cox* (1856) 18 CB 645.

3 *Preece v Corrie* (1828) 5 Bing 24; *Lewis v Baker* [1905] 1 Ch 46 at 51.

4 *Jolly v Arbuthnot* (1859) 4 De G & J 224; *Morton v Woods* (1869) LR 4 QB 293, Ex Ch; *Re Kitchin, ex p Punnett* (1880) 16 ChD 226, CA. *Morton v Woods* supra and *Re Kitchin, ex p Punnett* supra were both cases of a second mortgagee being landlord. A second mortgagee will usually have a legal reversion: see the Law of Property Act 1925 ss 85, 86, Sch 1 (as amended); and MORTGAGE. A licensee from the tenant is not, however, so estopped: see PARA 1040 the text and note 4 post. See also *Tadman v Henman* [1893] 2 QB 168; and see further DISTRESS vol 13 (2007 Reissue) PARAS 912, 916, 924-925.

5 *Doe d Barker v Goldsmith* (1832) 2 Cr & J 674.



Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1040. Estoppel between licensor and licensee.

#### **1040. Estoppel between licensor and licensee.**

There is no distinction, so far as concerns the law of estoppel, between a licensee and a tenant<sup>1</sup>; and a licensee who has obtained possession by aid of the licence must, before he can show that his licensor had no title<sup>2</sup> or that his licensor's title has determined, first surrender possession of the premises<sup>3</sup>. The mere fact of a person bringing goods on to demised premises by the tenant's licence does not estop him, however, from disputing the validity of the instrument of demise under which the tenant holds<sup>4</sup>.

1 As to the elements of a lease or tenancy, as opposed to a licence, see PARA 1030 note 3 ante; and LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 6 et seq.

2 *Terunnanse v Terunnanse* [1968] AC 1086, [1968] 1 All ER 651, PC.

3 *Doe d Johnson v Baytup* (1835) 3 Ad & El 188.

4 *Tadman v Henman* [1893] 2 QB 168.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1041. Tenant for life estopped from disputing remainderman's title.

**1041. Tenant for life estopped from disputing remainderman's title.**

Where possession has been acquired ostensibly under a conveyance or testamentary disposition creating a life interest in property to which the grantor or testator had no title, and the intended tenant for life subsequently obtains against the true owner a title by adverse possession<sup>1</sup>, he is estopped from setting up that title against anyone interested in remainder under the same instrument. Such estoppel binds all persons who are privy in estate to such a tenant for life; and thus his personal representative is estopped against the remainderman or those claiming under him from denying that the instrument is valid<sup>2</sup>. Subject to certain exceptions, no settlement created on or after 1 January 1997 is now a settlement for the purposes of the Settled Land Act 1925 and no life interest can be created under such a settlement<sup>3</sup>.

1 As to adverse possession of registered land see now the Land Registration Act 2002 Pt 9 (ss 96-98, Sch 6); *Land Registration for the Twenty-First Century, a Conveyancing Revolution* (Law Com no 271) (2001) PARA 14.6; and LAND REGISTRATION.

2 *Hawksbee v Hawksbee* (1853) 11 Hare 230; *Anstee v Nelms* (1856) 1 H & N 225 at 232 per Martin B; *Asher v Whitlock* (1865) LR 1 QB 1; *Board v Board* (1873) LR 9 QB 48; *Dalton v Fitzgerald* [1897] 2 Ch 86, CA; and cf the Limitation Act 1980 s 15(6), (7), Sch 1 para 9 (as amended); and LIMITATION PERIODS vol 68 (2008) PARAS 1094, 1155.

3 See the Trusts of Land and Appointment of Trustees Act 1996 ss 2, 27; and REAL PROPERTY vol 39(2) (Reissue) PARA 65; SETTLEMENTS.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/3. ESTOPPEL BY DEED/(3) ESTOPPEL ARISING FROM THE CREATION OF A LEGAL ESTATE BY DEED/1042. Effect of purported devise.

#### **1042. Effect of purported devise.**

When a testator has a good title to property in his lifetime but has no power of testamentary disposition, and nevertheless purports to devise the property, a person entering under the devise or in case of intestacy is not estopped from setting up a title by adverse possession against the person properly entitled or those claiming under him<sup>1</sup>; nor is a tenant for life under an invalid devise, or those claiming under him, estopped from disputing the remainderman's title under the same invalid devise<sup>2</sup>, because the devise itself, and not merely the title, is invalid and of no effect.

It would appear that, when the testator neither had a good title nor in fact purported to devise certain property, but a person enters ostensibly under the will or under a settlement purporting to be made in pursuance of the will, that person is estopped from setting up a title by adverse possession against a person entitled in remainder under the same instrument<sup>3</sup>.

1 *Paine v Jones* (1874) LR 18 Eq 320; *Re Anderson, Pegler v Gillatt* [1905] 2 Ch 70; *Re Coole, Coole v Flight* [1920] 2 Ch 536; cf *Dalton v Fitzgerald* [1897] 2 Ch 86 at 92, CA, per Lindley LJ, explaining *Re Stringer's Estate, Shaw v Jones-Ford* (1877) 6 ChD 1 at 10, CA. As to adverse possession of registered land see now the Land Registration Act 2002 Pt 9 (ss 96-98, Sch 6); *Land Registration for the Twenty-First Century, a Conveyancing Revolution* (Law Com no 271) (2001) PARA 14.6; and LAND REGISTRATION.

2 *Re Stringer's Estate, Shaw v Jones-Ford* (1877) 6 ChD 1 at 10, CA; *Re Tennent's Estate* [1913] 1 IR 280.

3 *Dalton v Fitzgerald* [1897] 2 Ch 86 at 91, CA, per Lindley LJ, commenting on *Paine v Jones* (1874) LR 18 Eq 320.

Subject to certain exceptions, no settlement created on or after 1 January 1997 is a settlement for the purposes of the Settled Land Act 1925: see PARA 1041 ante.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/4. ESTOPPEL IN PAIS/1043. Estoppel in pais; in general.

## 4. ESTOPPEL IN PAIS

### 1043. Estoppel in pais; in general.

Estoppel in pais arises where a public act has established a legal relationship between the parties, otherwise than by deed<sup>1</sup>. The acceptance of rent on the one hand, and of an estate on the other, raises an estoppel between landlord and tenant<sup>2</sup>, the landlord being precluded from denying the tenancy, and the tenant from denying his landlord's title. Thus surrender by operation of law occurs where the owner of a particular estate has been a party to some act which would not be valid if his particular estate had continued to exist, as, for example, where a tenant accepts a new lease from his landlord, or assents to the grant of a new lease to a third person to whom he gives up his possession<sup>3</sup>. The mere consent of a tenant for years who has sub-demised the land, in which therefore he retains only a reversion, to the grant by his landlord of a fresh lease to a stranger, does not amount to a surrender by operation of law of his reversion so as to enable the stranger to recover rent from the subtenant<sup>4</sup>.

An estoppel arose at common law from the acceptance of a bailment<sup>5</sup>, and from the relationship between a patentee and his licensee<sup>6</sup>. The signatory of a bill of exchange or promissory note is precluded as against subsequent holders from denying the truth and genuineness of various matters appearing, expressly or by implication, upon the bill at the time of his signature<sup>7</sup>. A company is estopped from denying, as against persons who have relied on the truth of them, that statements in a share certificate it has issued that a named person is the holder of the shares specified, or that those shares are fully paid up, are true<sup>8</sup>. An estoppel may also arise against a trustee in bankruptcy who seeks to have a creditor's proof expunged<sup>9</sup>.

1 See PARA 955 ante. As to the estoppel arising from the creation of a legal estate by deed see PARA 1029 et seq ante.

2 Co Litt 352; and see PARA 1031 ante.

3 As to surrender by operation of law see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 633 et seq. The rule that a transfer of possession, actual or constructive, by a tenant to his landlord, either pursuant to express agreement or under such circumstances that an agreement to terminate the tenancy may be inferred, works a surrender by operation of law has also been referred to the doctrine of estoppel in pais: see 2 Smith LC (13th Edn) 771. See also *Foster v Robinson*[1951] 1 KB 149 at 155, [1950] 2 All ER 342 at 346, CA, per Sir Raymond Evershed MR; *Moorgate Mercantile Co Ltd v Twitchings*[1976] QB 225 at 242, [1975] 3 All ER 314 at 323, CA, per Lord Denning MR; revsd on another point [1977] AC 890, [1976] 2 All ER 641, HL.

4 *Lyon v Reed* (1844) 13 M & W 285.

5 The common law rule is, however, substantially abrogated by statute: see the Torts (Interference with Goods) Act 1977 s 8; para 1044 post; and BAILMENT.

6 See PARA 1051 post.

7 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1457, 1503-1504.

8 See PARA 1045 post; and COMPANIES vol 14 (2009) PARA 387.

9 *Re Browne (a bankrupt), ex p Official Receiver v Thompson*[1960] 2 All ER 625 at 627, [1960] 1 WLR 692 at 694-695 per Cross J.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/4. ESTOPPEL IN PAIS/1044.  
Extent to which bailee estopped from denying bailor's title.

#### **1044. Extent to which bailee estopped from denying bailor's title.**

An estoppel somewhat similar to that between landlord and tenant arises at common law from the relation of bailor and bailee<sup>1</sup>. The common law rules have, however, been substantially abrogated by statute. The defendant in a claim<sup>2</sup> for wrongful interference with goods is entitled to show, in accordance with rules of court, that a third party has a better right than the claimant<sup>3</sup> as respects all or any part of the interest claimed by the claimant, or in right of which he sues; and any rule of law<sup>4</sup> to the contrary is abolished<sup>5</sup>. These provisions appear to abolish the common law rule that a bailee is estopped from denying his bailor's title<sup>6</sup>, although the bailee's estoppel may be preserved when the bailee sues otherwise than in tort<sup>7</sup>; and it has also been suggested that in order to rely on the statutory defence the bailee must join the relevant third party as a party to the claim<sup>8</sup>.

1 See generally BAILMENT. As to the similar estoppel arising between an agent and his principal see AGENCY vol 1 (2008) PARAS 95-96. At common law, as a general rule a bailee is estopped from denying the title of the bailor from whom he received the goods, and he is equally estopped from denying the title of one to whom he has attorned as his bailee, undertaking to hold the goods for him: see BAILMENT. As in the case of a tenant, however, the estoppel ceases if the bailee is evicted by title paramount: *Biddle v Bond* (1865) 6 B & S 225 at 232, citing *Shelbury v Scotsford* (1602) Yelv 23; *Hardman v Willcock* (1831) 9 Bing 382n (where, as Blackburn J points out, the finding of fraud in the bailor was not necessary to the decision); approved in *Rogers, Sons & Co v Lambert & Co* [1891] 1 QB 318 at 328, CA, per Lopes LJ and *Ross v Edwards & Co* (1895) 73 LT 100, PC. See also *Sheridan v New Quay Co* (1858) 4 CBNS 618 (common carriers, who had been employed by the purchaser from one who had no title, delivered the goods to the true owner on his request, and were allowed to set up his title: see *Sheridan v New Quay Co* supra at 650, where the statement of the law in Story, Equity Jurisprudence ss 266, 282 is commented on, and CARRIAGE AND CARRIERS); *Ranson v Platt* [1911] 2 KB 291, CA (warehouseman who had delivered up chattels to the bailor's husband under compulsion of a magistrate's order held not to be entitled to set up eviction by power paramount, as he should have given notice of the husband's claim to the bailor, and, if the bailor had attended before the magistrate, the order never would have been made); *Banco de Vizcaya v Don Alfonso de Borbon y Austria* [1935] 1 KB 140 (bailee cannot set up a title paramount which involves the execution of the penal laws of a foreign state). As to the withholding of recognition from foreign expropriatory and penal legislation see CONFLICT OF LAWS. If the true owner demands the goods and the bailee refuses to deliver them to him, he is guilty of conversion: *Wilson v Anderton* (1830) 1 B & Ad 450 at 456 (shipmaster's bailee, holding for supposed lien for freight, held liable to the owner of the goods).

On the same principle, at common law a bailee who has not actually had the goods taken out of his possession may set up the title of a third party against a claim by his bailor: *Biddle v Bond* (1865) 6 B & S 225 at 232 (auctioneer, entrusted with goods improperly seized under a distress, having been served with notice of claim by the true owner, but too late to stop their sale, allowed to set up his title against the bailor in an action for the proceeds); approved in *Rogers, Sons & Co v Lambert & Co* [1891] 1 QB 318 at 328, CA, per Lopes LJ; cf *Dixon v Yates* (1833) 5 B & Ad 313 at 340. See also *Ogle v Atkinson* (1814) 5 Taunt 759 at 761; *Cheesman v Exall* (1851) 6 Exch 341; *Thorne v Tilbury* (1858) 3 H & N 534; *European and Australian Royal Mail Co Ltd v Royal Mail Steam Packet Co* (1861) 30 LJCP 247. He may, however, do so only if he defends upon the right and title and by the authority of the third party: *Biddle v Bond* supra at 234, approving the judgment of Pollock CB in *Thorne v Tilbury* (1858) 3 H & N 534 at 537, qualifying the headnote in *Ogle v Atkinson* (1814) 5 Taunt 759 at 761, and followed in *Rogers, Sons & Co v Lambert & Co* supra at 328, CA, per Lopes LJ (where the bailee was admittedly defending in his own interest only); *Russian Commercial and Industrial Bank v Comptoir d'Escompte de Mulhouse* [1925] AC 112, HL; cf *Warren v Baring Bros & Co Ltd* (1910) 54 Sol Jo 720. The bailee cannot set up *jus tertii* if he accepts the bailment with full knowledge of the adverse claim: *Re Sadler, ex p Davies* (1881) 19 ChD 86, CA. The act of the third party in forbidding the bailee to part with the goods and requiring them to be retained for him is sufficient evidence of authority for this purpose: this proposition is involved in the decisions in *Biddle v Bond* supra; *Thorne v Tilbury* supra (appointment of administrator who, thereby becoming entitled to the goods, claimed them); *European and Australian Royal Mail Co Ltd v Royal Mail Steam Packet Co* (1861) 30 LJCP 247 (bailment of ship, subsequent mortgage by bailor, and demand of possession by mortgagee). The two last-mentioned cases illustrate the proposition of Lopes LJ that the bailee may, like a tenant, show that the bailor's title has expired since the bailment, but it is uncertain whether he could do so if the person who acquired the title made no claim.

It is not enough that the bailee has become aware of a third person's title, since he cannot set up the title of a person who has made no claim, or has abandoned it, as that would enable him to retain the goods for himself: *Biddle v Bond* supra at 234; *Betteley v Reed* (1843) 4 QB 511 at 517; *Roberts v Ogilby* (1821) 9 Price 269 (insurance agent cannot deny his principal's title to money received for him on the ground that other persons are interested); *Re Savoy Estate Ltd, Remnant v Savoy Estate Ltd* [1949] Ch 622, [1949] 2 All ER 286, CA. The decision and the language of the judges in *Cheesman v Exall* (1851) 6 Exch 341 indicate that in case of a pledge a greater latitude may be allowed to the pledgee. They founded their decision on the proposition that 'a pledgor impliedly undertakes that the property pledged is his own, and may safely be returned to him': see *Cheesman v Exall* supra at 343-344 per Pollock CB and Parke B; Pollock CB added 'and, if it turns out not to be so, the pledgee may restore it to its lawful owner'. In that case the pledgee of property, pledged with him for the purpose of avoiding an execution, was allowed to set up the title of third parties, although, so far as appears in the report, no claim had been made by them. This aspect of the case does not appear to have been referred to in any subsequent case, but it must be regarded with caution. A mortgagor of real property is never allowed to set up the title of a third person against his mortgagee: see *Doe d Bristow v Pegge* (1785) 1 Term Rep 758n at 760n per Lord Mansfield. Nor is it enough that an adverse claim is made, so that he may be entitled to interplead: *Biddle v Bond* supra at 234. An expectation of being sued by a third party is now sufficient to entitle the bailee to interplead: see CPR Sch 1 RSC Ord 17 r 1(1)(a); and CIVIL PROCEDURE vol 12 (2009) PARA 1588.

2 The statutory wording is 'action': but see CIVIL PROCEDURE vol 11 (2009) PARA 18.

3 The statutory wording is 'plaintiff': but see CIVIL PROCEDURE vol 11 (2009) PARA 18.

4 It is sometimes called 'jus tertii'.

5 Torts (Interference with Goods) Act 1977 s 8(1). See further TORT vol 45(2) (Reissue) PARA 644.

6 See note 1 supra.

7 See BAILMENT; TORT vol 45(2) (Reissue) PARA 644. Cf, however, *Rogers, Sons & Co v Lambert & Co* [1891] 1 QB 318 at 324, CA, per Lord Esher MR ('the rights between the plaintiffs and the defendants cannot be altered by the mere form of the action'). As to estoppel against an auctioneer, who is a bailee, see AUCTION vol 2(3) (Reissue) PARA 217.

8 See *De Franco v Metropolitan Police Comr* (1987) Times, 8 May, CA, per Lloyd LJ. As to the procedure on a claim for wrongful interference with goods, and application for a direction that another person be made a party, see CPR 19.5A; and CIVIL PROCEDURE vol 11 (2009) PARAS 212, 588.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/4. ESTOPPEL IN PAIS/1045.  
Extent to which a company is estopped by its certificate.

**1045. Extent to which a company is estopped by its certificate.**

A company which issues a certificate certifying that an individual shareholder named in it is a registered shareholder of the particular shares specified is estopped, as against transferees for value who have acted to their detriment on the faith of the certificate, from denying the truth of what is thus represented<sup>1</sup>. This estoppel gives no title to that which is the subject matter of estoppel; nor does the certificate amount to an implied warranty upon which a transferee may sue<sup>2</sup>. The court must look for the cause of action elsewhere upon the assumption that the company cannot dispute the facts stated in the certificate<sup>3</sup>.

1 See eg *Re Stapleford Colliery Co, Barrow's Case* (1880) 14 ChD 432, CA; and see further COMPANIES vol 14 (2009) PARA 387. As to forged certificates see eg *Balkis Consolidated Co v Tomkinson* [1893] AC 396, HL; and COMPANIES vol 14 (2009) PARA 387.

2 *Simm v Anglo-American Telegraph Co, Anglo-American Telegraph Co v Spurling* (1879) 5 QBD 188 at 206-207, CA, per Brett LJ.

3 *Re Ottos Kopje Diamond Mines Ltd* [1893] 1 Ch 618 at 628, CA, per Bowen LJ; *Balkis Consolidated Co v Tomkinson* [1893] AC 396, HL; and see COMPANIES vol 14 (2009) PARA 387.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/4. ESTOPPEL IN PAIS/1046.  
Forged transfer.

**1046. Forged transfer.**

A person who produces a forged transfer to a company, and by so doing has himself registered and a certificate issued to him, but does not further alter his position in reliance on those facts, cannot on discovery of the fraud make the company liable to him by estoppel, both because he has not acted to his prejudice on the faith of any representation by the company, and because, in producing the forged transfer, he himself induced the company to do the things of which he complains<sup>1</sup>. A further reason is that, although it is usual for companies to make inquiry of persons purporting to transfer their shares, such inquiry is for their own protection against liability to the real stockholder, and is not a duty which they owe to the transferee<sup>2</sup>.

<sup>1</sup> See the cases cited in PARA 1045 notes 1, 3 ante; and COMPANIES vol 14 (2009) PARA 387.

<sup>2</sup> *Simm v Anglo-American Telegraph Co, Anglo-American Telegraph Co v Spurling* (1879) 5 QBD 188 at 203, 209, 214, CA. This proposition appears to be good law notwithstanding the observations of Farwell J in *Dixon v Kennaway & Co* [1900] 1 Ch 833 at 841: see *Sheffield Corp v Barclay* [1905] AC 392 at 403, HL, per Lord Davey.



Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/4. ESTOPPEL IN PAIS/1047.  
Fully paid-up shares.

**1047. Fully paid-up shares.**

In the case of shares stated on the certificate to be fully paid-up, an estoppel is created against the company in favour of a transferee for value without notice, so that he is not liable to be placed on the list of contributories when less than the full amount has been paid on those shares<sup>1</sup>.

1 See eg *Burkinshaw v Nicolls* (1878) 3 App Cas 1004, HL; and COMPANIES vol 14 (2009) PARA 387.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/4. ESTOPPEL IN PAIS/1048. Company registers.

### **1048. Company registers.**

The register of members of a company is only prima facie evidence of matters inserted in it<sup>1</sup>, but in the case of government stock, the holders of which are registered in the books of the Bank of England, the Bank is estopped as against innocent purchasers from denying that the persons whose names are registered are the holders of stock, even if the original transfer of the stock was a forgery<sup>2</sup>. A person whose name is on the register of a company and who exercises acts of ownership over the shares standing in his name is estopped, in a claim for the amount of unpaid calls, from denying that the register is correct<sup>3</sup>.

1 See the Companies Act 1985 s 361; and COMPANIES vol 14 (2009) PARA 345.

2 *Davis v Bank of England* (1824) 2 Bing 393 at 407; *Bank of England v Cutler* [1908] 2 KB 208 at 234, CA; cf *Hare v London and North-Western Rly Co* (1860) John 722 (as an instance of the case of an ordinary company where registration made on account of a forged transfer was held to be of no effect).

3 *Re Peruvian Rlys Co, Crawley's Case, Robinson's Case* (1869) 4 Ch App 322; *Re Railway Time Tables Publishing Co, ex p Sandys* (1889) 42 ChD 98, CA; cf *Hull Flax and Cotton Mill Co v Wellesley* (1860) 6 H & N 38. A company is not, however, estopped by sending a dividend warrant from denying the payee's title to the shares: *Foster v Tyne Pontoon and Dry Docks Co and Renwick* (1893) 63 LJQB 50.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/4. ESTOPPEL IN PAIS/1049. Certification of transfers.

**1049. Certification of transfers.**

The certification by a company of any instrument of transfer of any shares in the company is to be taken as a representation by the company to any person acting on the faith of the certification that there have been produced to the company such documents as on their face value show a prima facie title to the shares in the transferor named in the instrument; but the certification is not to be taken as a representation that the transferor has any title to the shares<sup>1</sup>.

1 See the Companies Act 1985 s 184; and COMPANIES vol 14 (2009) PARAS 405, 417.

**UPDATE**

**1049 Certification of transfers**

TEXT AND NOTES--1985 Act s 184 now the Companies Act 2006 s 775.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/4. ESTOPPEL IN PAIS/1050. Blank transfers.

### 1050. Blank transfers.

A person who signs a blank transfer<sup>1</sup> in order to enable his broker to fill it up with particular shares is estopped from asserting that he signed the transfer in blank so as to show that it is void in law<sup>2</sup>, provided the broker carried out his instructions; but where a broker has so acted as to make the whole transaction a forgery, filling up the transfer with a description of shares other than those specified, and has stolen the certificate of the shares in order to enable him to effect his purpose, the transferor's conduct in executing the deed in blank is not the real or proximate cause of the loss occasioned, and he is not estopped from asserting the true facts in a claim against the company for wrongfully removing his name from the register<sup>3</sup>.

In the absence of any mercantile usage creating an element of negotiability there is therefore no estoppel in favour of a person who takes a transfer in blank and fills up the blanks in his own favour without the original transferor's consent or knowledge<sup>4</sup>.

Where the certificate contains on the back a blank form of transfer, and the practice is for such documents to pass from hand to hand, then, when the transfers are duly signed by the registered holders of the shares, each prior holder confers upon the person who for the time being is the holder in good faith for value of the certificates an authority to fill in the name of the transferee, and is estopped from denying that authority<sup>5</sup>; but a title by unregistered transfer is not equivalent to what has been termed the legal estate in the shares or to the complete dominion over them<sup>6</sup>.

1 As to transfers in blank generally see COMPANIES vol 14 (2009) PARA 401.

2 *le* as in *Hibblewhite v M'Morine* (1840) 6 M & W 200; *France v Clark* (1884) 26 ChD 257 at 263, CA. A person who signs a blank transfer is bound not to hinder registration: see *Hooper v Herts* [1906] 1 Ch 549, CA.

3 *Swan v North British Australasian Co* (1863) 2 H & C 175, Ex Ch, disapproving at 182 *Coles v Bank of England* (1839) 10 Ad & El 437; explained by Mellish LJ in *Hunter v Walters, Curling v Walters, Darnell v Hunter* (1871) 7 Ch App 75 at 87; cf *Sheffield, Ashton-under-Lyne and Manchester Rly Co v Woodcock* (1841) 7 M & W 574 at 583; *Taylor v Great Indian Peninsula Rly Co* (1859) 4 De G & J 559; *Fry v Smellie* [1912] 3 KB 282, CA; *Fuller v Glyn, Mills, Currie & Co* [1914] 2 KB 168. As to negligence being the proximate cause of loss see *Mayor, Constables & Co of Merchants of Staple of England v Governor & Co of Bank of England* (1887) 21 QBD 160, CA, following *Bank of Ireland v Evans' Charities Trustees* (1855) 5 HL Cas 389; and PARA 1063 post. As to the signature of blank transfers by executors see *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267, HL; *Colonial Bank v Hepworth* (1887) 36 ChD 36; *Fox v Martin* (1895) 64 LJ Ch 473; *Fry v Smellie* supra; *Fuller v Glyn, Mills, Currie & Co* supra; *Hutchinson v Colorado United Mining Co and Hamill* (1886) 3 TLR 265, CA; and COMPANIES vol 14 (2009) PARA 401.

4 *France v Clark* (1884) 26 ChD 257 at 262, CA; followed in *Fox v Martin* (1895) 64 LJ Ch 473; *Samuel Montagu & Co v Weston, Clevedon and Portishead Light Rlys Co* (1903) 19 TLR 272; cf *Taylor v Great Indian Peninsula Rly Co* (1859) 4 De G & J 559.

5 *Colonial Bank v Cady and Williams* (1890) 15 App Cas 267 at 286, HL, per Lord Herschell; *Hone v Boyle, Low, Murray & Co* (1891) 27 LR Ir 137, CA (American securities).

6 *Colonial Bank v Hepworth* (1887) 36 ChD 36 at 53 per Chitty J. A bank taking such securities from a professional moneylender, however, is not such a holder in good faith for value as to be protected by estoppel: *Earl of Sheffield v London Joint Stock Bank* (1888) 13 App Cas 333, HL. Such certificates are not negotiable instruments: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1618; COMPANIES vol 14 (2009) PARA 401.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/4. ESTOPPEL IN PAIS/1051. Whether licensee of patent may be estopped from denying validity.

### **1051. Whether licensee of patent may be estopped from denying validity.**

An estoppel which is very closely analogous to that between landlord and tenant<sup>1</sup> arose at common law between a patentee and his licensee. In some of the cases the estoppel was by deed<sup>2</sup>, but apart from this the licensee of a patent under agreement with the patentee, so long as he continued to act under the licence or during the continuance of the agreement, was not at liberty to dispute the validity of the patent in a claim under the licence<sup>3</sup>; further, a licensee might be estopped by his conduct from denying that he was acting under an agreement<sup>4</sup>. It seems, however, that such an agreement would now be void under European Union law<sup>5</sup>.

On a somewhat different principle, a patentee, after assignment of the patent, is, as between himself and the assignee and those claiming under him, estopped from disputing the validity of the patent<sup>6</sup>; but this is also now subject to the provisions of European Union law regarding anti-competitive practices<sup>7</sup>.

1 As to estoppel between landlord and tenant see PARA 1029 et seq ante.

2 As to estoppel by deed see PARA 1011 et seq ante.

3 See *Crossley v Dixon* (1863) 10 HL Cas 293.

4 See *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247, [1956] 1 WLR 29, CA. As to estoppel by conduct see PARA 1058 et seq post.

5 See PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 388.

6 See *Walton v Lavater* (1860) 8 CBNS 162 at 180, 186; and PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARA 554. An assignor may, however, exclude liability in respect of his right to assign the patent: see the Unfair Contract Terms Act 1977 ss 1(2), 3, Sch 1 para 1(c) (as amended); and CONTRACT vol 9(1) (Reissue) PARA 828.

7 See PATENTS AND REGISTERED DESIGNS vol 79 (2008) PARAS 375, 554.

## **UPDATE**

### **1051 Whether licensee of patent may be estopped from denying validity**

NOTES--Certain functions under provisions mentioned in this paragraph are 'relevant functions' for the purposes of the Regulatory Enforcement and Sanctions Act 2008 s 4, Sch 3, see LOCAL GOVERNMENT vol 69 (2009) PARA 733.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(i) The Representation/A. IN GENERAL/1052. Basis of principle in law and equity.

## **5. ESTOPPEL BY REPRESENTATION**

### **(1) GENERAL PRINCIPLES**

#### **(i) The Representation**

##### **A. IN GENERAL**

##### **1052. Basis of principle in law and equity.**

The branch of estoppel most frequently invoked in modern times, and presenting itself in infinite variety, developed from estoppel in pais<sup>1</sup> in the nineteenth century and is generally known as estoppel by representation<sup>2</sup>. Estoppel by representation is not distinguishable in principle from what was sometimes spoken of in courts of equity as equitable estoppel. The principle is one equally of law and equity<sup>3</sup>; the only distinctions seem to be that in equity it was apparently applied only to cases where a person had entered into a contract on the faith of the representations made, which might have been made either by a party to the contract or by a third person<sup>4</sup>; and that, whereas the common law phrase was that the person who made the representations was not allowed to deny their truth, the phrase of equity was that he must 'make his representations good'<sup>5</sup>.

In order for estoppel by representation to operate, there must have been a representation made by the person to be estopped to the person claiming the benefit of the estoppel<sup>6</sup>. To form the basis of an estoppel a representation may be made either by statement or by conduct; and conduct includes negligence<sup>7</sup> and silence<sup>8</sup>. Certain general propositions are, however, applicable, in whatever manner the representation is made. The representation must be made voluntarily<sup>9</sup>; if made apparently on another's behalf, it must be made by a person having the authority to do so<sup>10</sup>; it must be communicated to the person to whom it was addressed<sup>11</sup>; and only the person to whom it was addressed may use it to support a plea of estoppel<sup>12</sup>.

1 As to estoppel in pais see PARAS 955, 1043 et seq ante; as to the development of estoppel by representation see PARA 956 ante; and as to the extent to which common law estoppel by representation, promissory estoppel and proprietary estoppel are separate categories of estoppel by representation see PARAS 957-959 ante, para 1076 et seq post.

2 Lord Campbell CJ and Wightman J doubted whether this was properly called estoppel; the former preferred the expression 'conclusion': *Howard v Hudson* (1853) 2 E & B 1 at 10-11; and see *Carr v London and North Western Ry Co* (1875) LR 10 CP 307 at 317. A very high authority has questioned the advantage of reducing the principles of estoppel by representation to rules (*George Whitechurch Ltd v Cavanagh* [1902] AC 117 at 130, HL, per Lord Macnaghten; and see *Comitti v Maher* (1905) 94 LT 158 at 159 per Kekewich J; *De Tchiatchef v Salerni Coupling Ltd* [1932] 1 Ch 330 at 342); but the definition is undeniably useful in practice. As to what constitutes a representation see PARA 1053 et seq post; and see generally MISREPRESENTATION AND FRAUD.

3 *Jorden v Money* (1854) 5 HL Cas 185 at 210 per Lord Cranworth. The phrase 'equitable estoppel' has acquired a new meaning and is now often used to refer to promissory estoppel and proprietary estoppel: see PARA 1082 et seq post.

4 In the early cases the contracts were typically marriage contracts: see *Gale v Lindo* (1687) 1 Vern 475 (Lord Jeffreys LC); *Montefiori v Montefiori* (1762) 1 Wm Bl 363 (Lord Mansfield CJ), a common law case arising on an arbitrator's award; *Neville v Wilkinson* (1782) 1 Bro CC 543 (Lord Thurlow LC); and see *Jorden v Money* (1854) 5 HL Cas 185. For later applications of the same doctrine in equity to other contracts see *Burrowes v*

*Lock* (1805) 10 Ves 470 at 475, as explained in *Low v Bouverie*[1891] 3 Ch 82, CA; *Dalbiac v Dalbiac* (1809) 16 Ves 116 at 125; *Piggott v Stratton* (1859) 1 De GF & J 33 (representation by a party to the contract); *Davies v Davies* (1860) 6 Jur NS 1320; *Mansel-Lewis v Lees* (1910) 102 LT 237; cf *Edmonds v Best* (1862) 7 LT 279.

5 Lord Selborne LC defined 'equitable estoppel by representation' in *Citizens' Bank of Louisiana v First National Bank of New Orleans*(1873) LR 6 HL 352 at 360, in terms differentiated from the common law doctrine only by the use of these words, and cited in support of his definition decisions of common law courts usually cited in that connection, namely, *Jorden v Money* (1854) 5 HL Cas 185; *Pickard v Sears* (1837) 6 Ad & El 469; *Freeman v Cooke*(1848) 2 Exch 654; and see *George Whitechurch Ltd v Cavanagh*[1902] AC 117 at 130, HL, per Lord Macnaghten; *Mills v Fox*(1887) 37 ChD 153 at 164; *Gresham Life Assurance Society v Crowther*[1914] 2 Ch 219 at 228; affd [1915] 1 Ch 214, CA. In *Lovett v Lovett*[1898] 1 Ch 82 Romer J used the expression 'equitable estoppel' in contradistinction to 'estoppel at law', by which it is quite clear from the context he meant 'estoppel by deed'. His proposition, founded on the definition by Lord Selborne LC, referred to in this note supra, that equitable estoppel is not applied in favour of a volunteer, is only another form of the common law rule that in order to take advantage of a representation as an estoppel one must show that he has altered his position on the faith of it. See also PARA 1089 et seq post; EQUITY vol 16(2) (Reissue) PARA 909; and MISREPRESENTATION AND FRAUD; SPECIFIC PERFORMANCE.

6 See eg *Moorgate Mercantile Co Ltd v Twitchings*[1976] QB 225 at 241, [1975] 3 All ER 314 at 323, CA, per Lord Denning MR; revsd on another point [1977] AC 890, [1976] 2 All ER 641, HL.

7 *Freeman v Cooke*(1848) 2 Exch 654 at 664.

8 *Covell v Sweetland*[1968] 2 All ER 1016, [1968] 1 WLR 1466 (the plaintiff's failure to disabuse the defendant of his belief, evinced in correspondence with the plaintiff, that his maintenance obligation would cease on her remarriage, estopped the plaintiff from later denying that the fact was as represented). See also *Pacol Ltd v Trade Lines Ltd and R/I Sif IV, The Henrik Sif*[1982] 1 Lloyd's Rep 456; and PARA 1078 post. Cf para 1059 the text to note 1 post.

9 *Debs v Sibec Developments Ltd* [1990] RTR 91 (receipt signed at gunpoint not acceptable as a representation).

10 As to authority to make representations on behalf of another see eg *Credit Suisse v Allerdale Borough Council* [1995] 1 Lloyd's Rep 315 at 367 (affd [1997] QB 306, [1996] 4 All ER 129, CA); *Re Selectmove*[1995] 2 All ER 531 at 539, [1995] 1 WLR 474 at 481, CA; *South Buckinghamshire District Council v Flanagan*[2002] EWCA Civ 690, [2002] 1 WLR 2601, [2002] All ER (D) 248 (May). As to agency by estoppel see AGENCY vol 1 (2008) PARAS 25-26.

11 See eg *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt* [1985] 2 Lloyd's Rep 28 at 34-35, CA, per Kerr LJ; cf *Norwegian American Cruises A/S (formerly Norwegian American Lines A/S) v Paul Mundy Ltd, The Vistafjord* [1988] 2 Lloyd's Rep 343 at 351, CA, per Bingham LJ.

12 See eg *Hammersmith London Borough Council v Top Shop Centres Ltd*[1990] Ch 237 at 257 per Warner J (reported, but not on this point, [1989] 2 All ER 655); *Hillingdon London Borough Council v ARC Ltd*[2000] 3 EGLR 97, [2000] All ER (D) 820, CA (shared assumption not sufficient to establish an estoppel unless communicated). The general public cannot claim the benefit of an estoppel: see *CIN Properties Ltd v Rawlins*[1995] 2 EGLR 130 at 134, CA, per Balcombe LJ.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(i) The Representation/A. IN GENERAL/1053. Representation cannot create a state of things which the representor is legally disabled from creating.

**1053. Representation cannot create a state of things which the representor is legally disabled from creating.**

A party cannot by representation, any more than by other means<sup>1</sup>, raise against himself an estoppel so as to create a state of things which he is legally disabled from creating<sup>2</sup>. Thus a corporate or statutory body cannot be estopped from denying that it has entered into a contract which it was ultra vires<sup>3</sup> for it to make<sup>4</sup>. No corporate body can be bound by estoppel to do something beyond its powers<sup>5</sup> or to refrain from doing what it is its duty to do<sup>6</sup>; and the same principle applies to individuals. No person can by his conduct or otherwise waive or renounce a right to perform a public duty, or estop himself from insisting that it is right to do so<sup>7</sup>.

A corporate body may, however, be estopped from denying that it is bound by a voidable contract<sup>8</sup>.

A minor cannot, by a fraudulent representation that he is of age made to induce a contract, estop himself from denying his disability<sup>9</sup>.

1 Cf para 968 note 3 ante.

2 See *Square v Square (otherwise Bewicke)* [1935] P 120.

3 The validity of an act done by a company may not now be called into question on the ground of lack of capacity by reason of anything in the company's memorandum: see the Companies Act 1985 s 35(1) (as substituted); and COMPANIES vol 14 (2009) PARA 265.

4 *Canterbury Corp'n v Cooper* (1909) 100 LT 597, CA; *Minister of Agriculture and Fisheries v Matthews* [1950] 1 KB 148, [1949] 2 All ER 724; *British Mutual Banking Co v Charnwood Forest Rly Co* (1887) 18 QBD 714 at 718, CA, per Bowen LJ; *York Corp'n v H Leatham & Sons Ltd* [1924] 1 Ch 557; cf *Re African Gold Concessions and Development Co, Markham and Darter's Case* [1899] 1 Ch 414 at 431 (affd without discussing this point [1899] 2 Ch 480, CA); *A-G v Dublin Corp'n* (1841) 1 Dr & War 545; *Rhyl UDC v Rhyl Amusements Ltd* [1959] 1 All ER 257, [1959] 1 WLR 465 (council, having acted ultra vires in granting a lease, could not be estopped from denying its validity); but see note 3 supra. The rule that a person cannot be estopped from denying the existence of a contract which is prohibited, or made illegal, by statute does not apply where penalties are attached if the contract is not made in a certain way. Therefore a member of a mutual insurance company might be estopped from pleading, in an action for calls, that they were for losses paid on contracts which were unstamped and not contained in a policy: *Barrow Mutual Ship Insurance Co v Ashburner* (1885) 54 LJQB 377, CA; cf *Re Coltman, Coltman v Coltman* (1881) 19 ChD 64, CA. See PARA 1022 ante.

A distinction must be made between acts which are outside a body's legal powers and those for the validity of which certain formalities are necessary. In the latter case, persons dealing without notice of any informality are entitled to presume that all things have been rightly and duly performed (*omnia rite esse acta*). Accordingly a company which, possessing the requisite powers, so conducts itself in issuing debentures as to represent to the public that they are legally transferable, cannot set up any irregularity in their issue against an equitable transferee for value who has no reason to suspect it: see note 3 supra; and COMPANIES vol 14 (2009) PARA 265. Where a company is estopped from showing that the issue of certain debentures was invalid, the holders of admittedly valid debentures issued before the estoppel arose may not be affected by it, and as against them the holders of the invalid debentures may be postponed, although their security purports to rank *pari passu* with the valid issue: *Mowatt v Castle Steel and Iron Works Co* (1886) 34 ChD 58 at 63, CA; distinguished in *Robinson v Montgomeryshire Brewery Co* [1896] 2 Ch 841 at 849 (validity of the debentures not in question).

5 *British Mutual Banking Co v Charnwood Forest Rly Co* (1887) 18 QBD 714 at 719, CA, per Fry LJ. This principle was applied (but with doubt and, as the Court of Appeal held in the circumstances, wrongly) by Vaughan Williams J in *Bishop v Balkis Consolidated Co* (1890) 25 QBD 77 at 84; affd on other grounds 25 QBD 512, CA.



6 *Maritime Electric Co Ltd v General Dairies Ltd* [1937] AC 610, [1937] 1 All ER 748, PC; *St Mary, Islington, Vestry v Hornsey UDC* [1900] 1 Ch 695, CA; *Sunderland Corp v Priestman* [1927] 2 Ch 107; *Southend-on-Sea Corp v Hodgson (Wickford) Ltd* [1962] 1 QB 416, [1961] 2 All ER 46, DC (statement that no planning permission was necessary for user as a builder's yard did not estop a planning authority from later exercising its statutory discretion in deciding to serve an enforcement notice to prevent such use); cf *Wells v Minister of Housing and Local Government* [1967] 2 All ER 1041 at 1044, [1967] 1 WLR 1000 at 1007, CA, per Lord Denning MR ('A public authority cannot be estopped from doing its... duty but... it can be estopped from relying on technicalities'); followed in *Re L (AC) (an infant)* [1971] 3 All ER 743 (corporation held to be estopped, by a representation that no written notice of objection to a resolution under the Children Act 1948 (repealed) was necessary, from alleging that none had been issued in time); *Lever Finance Ltd v Westminster (City) London Borough Council* [1971] 1 QB 222, [1970] 3 All ER 496, CA (local planning authority which delegated authority to its planning officer to inform a developer that a variation in the detailed plan for which planning permission had been granted was not material, estopped from later maintaining that further planning permission was necessary); *Norfolk County Council v Secretary of State for the Environment* [1973] 3 All ER 673, [1973] 1 WLR 1400, DC. See also *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204, CA; *Rootkin v Kent County Council* [1981] 2 All ER 227, [1981] 1 WLR 1186, CA. See now, however, *R v East Sussex County Council, ex p Reprotech (Pebsham) Ltd* [2002] UKHL 8, [2002] 4 All ER 58, [2003] 1 WLR 348 (inappropriate to import private law concept of estoppel into public law); and PARA 961 ante.

7 *MacAllister v Bishop of Rochester* (1880) 5 CPD 194, DC; *Customs and Excise Comrs v Hebson Ltd* [1953] 2 Lloyd's Rep 382 at 396 (customs officers held not to be estopped from exercising their statutory powers relating to the importation of goods by the fact that similar goods had previously been admitted to the country in error). However, a local authority may, by a notice which is within its powers, intended to be acted on or not at the receiver's option, conclusively elect to proceed in a particular way if it is not complied with: *Gould v Bacup Local Board* (1881) 50 LJMC 44. Stephen J speaks of this as estoppel, but there was no representation of any fact.

8 *Janred Properties Ltd v Ente Nazionale Italiano per il Turismo* [1989] 2 All ER 444, CA.

9 *Johnson v Pye* (1665) 1 Sid 258, cited in *Stikeman v Dawson* (1847) 1 De G & Sm 90 at 113; *R Leslie Ltd v Sheill* [1914] 3 KB 607, CA; and see CHILDREN AND YOUNG PERSONS vol 5(3) (2008 Reissue) PARA 23.

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#### **1054. Representation by agent.**

A representation made by an agent is as effectual for the purpose of estoppel as if it had been made by his principal<sup>1</sup>. Thus a company may be estopped by representations made by its officer in the ordinary way of business<sup>2</sup>. It is equally clear, however, that no estoppel can arise from the representation of an agent unless it is within his actual or ostensible authority to make it<sup>3</sup>.

The agent's knowledge, acquired when acting within the scope of his authority, may be that of his principal, so that the principal cannot be heard to say that, in making a representation, or in pursuing a course of conduct relied on as such, he did so in ignorance of facts so known to the agent<sup>4</sup>.

1 See *A-G to Prince of Wales v Collom* [1916] 2 KB 193 at 203 per Atkin J; *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330 at 342 per Luxmoore J ('if a person authorises or permits another to make a representation for the purpose of it being acted upon and it is acted upon, that person cannot afterwards be heard to say that the representation is not true'); *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 at 243, [1975] 3 All ER 314 at 324, CA, per Lord Denning MR ('the owner is estopped by the conduct of anyone to whom he entrusts the task of looking after his property and interests'); revsd on another point [1977] AC 890, [1976] 2 All ER 641, HL; *Crabb v Arun District Council* [1976] Ch 179 at 193, [1975] 3 All ER 865 at 875, CA, per Scarman LJ ('within reasonable limits, those to whom a defendant entrusts the conduct of negotiations must be treated as having the authority which, within the course of the negotiations, they purport to exercise'). See also *Ismail v Polish Ocean Lines* [1976] QB 893, [1976] 1 All ER 902, CA (representation as to stowage by charterer's agent).

2 See eg *Bishop v Balkis Consolidated Co* (1890) 25 QBD 512, CA; *Manchester and Oldham Bank Ltd v W A Cook & Co* (1883) 49 LT 674 (bank manager); *Re Wickham* (1917) 34 TLR 158 (solicitor); *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711, [1971] 3 All ER 16, CA (company secretary). As to estoppel on companies see further PARA 1045 ante; and as to the liability of a company for its agents' acts or representations generally see COMPANIES vol 14 (2009) PARA 387.

3 See AGENCY vol 1 (2008) PARA 124; COMPANIES vol 14 (2009) PARA 387. See also *Postmaster-General v Green* (1887) 51 JP 582, CA. The master of a ship has authority to make statements in a bill of lading as to the condition of the goods (*Cia Naviera Vasconzada v Churchill and Sim*, *Cia Naviera Vasconzada v Burton & Co* [1906] 1 KB 237), and whether freight is payable or not (*Howard v Tucker* (1831) 1 B & Ad 712); but no one may assume that he has authority to sign for goods which have not been shipped (*Grant v Norway* (1851) 10 CB 665), or to make representations as to their quality (*Cox v Bruce* (1886) 18 QBD 147, CA). If the principal thinks the agent has exceeded his authority, the principal can prevent an estoppel arising by so informing the claimant before the claimant acts on the agent's representation: *Crabb v Arun District Council* [1976] Ch 179 at 193, [1975] 3 All ER 865 at 876, CA, per Scarman LJ.

4 See AGENCY vol 1 (2008) PARAS 121-124, 137. If the facts are known, ignorance of their legal consequence is immaterial: *Deeley v Lloyds Bank* [1910] 1 Ch 648 at 672, CA; revsd [1912] AC 756, HL (the conduct relied on as creating an estoppel did not, having taken place as it did and in the circumstances in which it did, raise an estoppel).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(i) The Representation/B. REPRESENTATION MADE BY STATEMENT/1055. Examples of statements giving rise to estoppel by representation.

## **B. REPRESENTATION MADE BY STATEMENT**

### **1055. Examples of statements giving rise to estoppel by representation.**

The following are examples of statements which have given rise to an estoppel by representation: a false statement as to the ownership of goods<sup>1</sup>; a statement by warehousemen that certain goods lay at their warehouse<sup>2</sup>; a statement by the vendor of unappropriated goods recognising delivery orders as correct, the estoppel being from denying that the property passed<sup>3</sup>; a false declaration as to the value of horses tendered for carriage<sup>4</sup>; a fraudulent representation by an agent that goods bought for himself were bought for his principals<sup>5</sup>; a statement by a bank manager who had authority to arrange loans that the board had approved a proposed loan, which was made subject to the board's approval<sup>6</sup>; a statement by insurance brokers in a letter that two policies were held by them to the order of the shipowner, the estoppel being from setting up a general lien for premiums due by the charterer in respect of other policies effected on the ship<sup>7</sup>; an erroneous entry in a rate book as to the gross estimated rental of premises<sup>8</sup>; a statement to a local authority making inquiries prior to the compulsory purchase of land that a person owned no interest in the land, the estoppel being from later asserting that he was a tenant or occupier of the land<sup>9</sup>; the giving of a statutory notice<sup>10</sup> setting out his terms of employment to a workman, estopping the giver from denying he was the workman's employer<sup>11</sup>.

It has been held that a person who makes application for shares in a company in a fictitious name, upon which application shares are granted, is estopped from denying that he is a shareholder and liable to contribute as such<sup>12</sup>. A person named in an invoice, not intended to be a contract, as the seller of goods is not estopped against one who has not been misled from denying that he was so<sup>13</sup>.

An admission may found an estoppel. An employer has been precluded by his admission of a contract of service from denying the authority of his employee to act for him<sup>14</sup>; an admission made by a barrister in the course of proceedings may not be allowed to be withdrawn if the other party has acted on it to his detriment<sup>15</sup>; and a solicitor who admitted that money was received by him for the purpose of investment on mortgage and was so invested was precluded from denying that it was part of a larger sum invested on mortgage in the solicitor's name<sup>16</sup>. An admission that money has been received which is capable of explanation creates no estoppel<sup>17</sup>; nor does an admission made under threat of violence<sup>18</sup>. The position with regard to an admission made under mistake is less clear cut<sup>19</sup>.

1 *Richards v Johnston* (1859) 4 H & N 660.

2 *Seton v Lafone* (1887) 19 QBD 68, CA.

3 *Woodley v Coventry* (1863) 2 H & C 164; *Knights v Wiffen* (1870) LR 5 QB 660; *Wah Tat Bank Ltd and Oversea-Chinese Banking Corp Ltd v Chan Cheng Kum and Hua Siang Steamship Co Ltd* [1967] 2 Lloyd's Rep 437; on appeal sub nom *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC.

4 *M'Cance v London and North Western Ry Co* (1861) 7 H & N 477; affd (1864) 3 H & C 343, Ex Ch. The grounds of decision in the two courts, though not inconsistent, were not the same. As to declarations concerning goods for carriage see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 20, 28 et seq.

5 *Harris v Truman* (1882) 9 QBD 264, CA.

6 *Manchester and Oldham Bank Ltd v W A Cook & Co* (1883) 49 LT 674.

7 *Fairfield Shipbuilding and Engineering Co Ltd v Gardner, Mountain & Co Ltd* (1911) 104 LT 288.

8 *Hendon Paper Works Co v Sunderland Assessment Committee* [1915] 1 KB 763, CA.

9 *Milford Haven UDC v Foster* (1961) 13 P & CR 289.

10 Ie under the Contracts of Employment Act 1963 (repealed): see now the Employment Rights Act 1996 s 1; and EMPLOYMENT vol 39 (2009) PARA 94.

11 *Smith v Blandford Gee Cementation Co Ltd* [1970] 3 All ER 154, DC. See also *The Twentje* (1860) 13 Moo PCC 185 (shipping agents estopped by their accounts from appropriating certain freights to the prejudice of their principals, who, after settling with the owners on the footing of those accounts, became purchasers of the ship); *Deutsche Bank (London Agency) v Beriro and Co* (1895) 73 LT 669, CA (bankers, agents for collection of bill of exchange, having advised their indorsers (also agents) that the bill had been collected, and paid them the supposed proceeds, estopped after the latter had credited their principals from proving that the money was paid by mistake); *Keith v R Gancia & Co Ltd* [1904] 1 Ch 774, CA (representation in licence to assign that the mortgagee, who had foreclosed, was the person in whom the reversion on a sublease created by the mortgagor, before the Conveyancing Act 1881, was vested, relying on which the subtenant had assigned, and his assignee had accepted the assignment); *AA Amram Ltd v Bremar Co Ltd* [1966] 1 Lloyd's Rep 494 (statement by party to arbitration that it accepted the arbitrator's decision estopped that party from later moving to set aside the award).

12 *Re Central Klondyke Gold Mining and Trading Co, Savigny's Case* (1898) 5 Mans 336, following *Re Hercules Insurance Co, Pugh and Sharman's Case* (1872) LR 13 Eq 566 (application in name of person under disability). Estoppel was not mentioned in *Re Hercules Insurance Co, Pugh and Sharman's Case* supra, and it seems it is not the true ground for the decision, for the shareholder was prevented, not from contradicting, but from affirming, his original misrepresentation. The principle involved seems rather to be *ut res magis valeat quam pereat* ('it is better for a thing to have effect than to be made void').

13 *Holding v Elliott* (1860) 5 H & N 117, dissenting from *Jones v Littledale* (1837) 6 Ad & El 486.

14 *R v Solly* (1840) Woll 6.

15 *Kelly v Bushby, The Clifton* (1835) 3 Knapp 375, PC; *H Clark (Doncaster) Ltd v Wilkinson* [1965] Ch 694, [1965] 1 All ER 934, CA.

16 *Middleton v Pollock, ex p Wetherall* (1876) 4 ChD 49.

17 *Miller v Douglas* (1886) 56 LJ Ch 91.

18 *Debs v Sibec Developments Ltd* [1990] RTR 91 (owner of stolen car forced to sign purported receipt at gunpoint; not estopped from denying robbers' authority to sell car).

19 It has been held that an admission made under mistake does not create an estoppel: *Pierce v Evans* (1835) 2 Cr M & R 294. See also *Re Deerhurst, ex p Seaton* (1891) 60 LJQB 411; affd on other grounds 7 TLR 373, CA (letter from a debtor's solicitor to a creditor to prove his debt, which was unprovable, for the purpose of voting in support of a scheme, held not to operate as an estoppel between the creditor and the trustee in bankruptcy or to justify the trustee in paying a composition on the debt); *R v S* 1914 SC 193 (an admission was made that defamatory statements were untrue and an undertaking was given not to repeat them; subsequent repetition of the statements was treated not as a breach of the agreement, but as a new wrong; the person making the statement was held not to be precluded from proving that the statement was in fact true). Cf *Sandys v Hodgson* (1839) 10 Ad & El 472. See also MISTAKE vol 77 (2010) PARA 28. As to the effect of admissions of assets see EXECUTORS AND ADMINISTRATORS.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(i) The Representation/B. REPRESENTATION MADE BY STATEMENT/1056. Statements in bills of lading.

### **1056. Statements in bills of lading.**

As a class, perhaps, the most important statements which may give rise to an estoppel are those which occur in documents to which credit is given in mercantile dealings as the indicia of title to goods. Of these, bills of lading may be regarded as typical. It had long been held that a shipowner was estopped as against the assignee of a bill of lading by an erroneous statement in it that freight had been paid in advance<sup>1</sup>, and the principle has been applied to the statement that goods had been shipped in apparent good order and condition<sup>2</sup>. By virtue of the Carriage of Goods by Sea Act 1924, a bill of lading which represents goods to have been shipped on board a vessel or to have been received for shipment on board a vessel and which has been signed by the master of the vessel or by a person who was not the master but had the express, implied or apparent authority of the carrier to sign bills of lading, is, in favour of a person who has become the lawful holder of the bill, conclusive evidence against the carrier of the shipment of the goods or, as the case may be, of their receipt for shipment<sup>3</sup>.

1 *Howard v Tucker* (1831) 1 B & Ad 712.

2 *Cia Naviera Vasconzada v Churchill and Sim*, *Cia Naviera Vasconzada v Burton & Co* [1906] 1 KB 237; *Martineaus Ltd v Royal Steam Packet Co Ltd* (1912) 106 LT 638; *The Tromp* [1921] P 337; *Brandt v Liverpool, Brazil and River Plate Steam Navigation Co Ltd* [1924] 1 KB 575, CA; *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416, CA; *The Skarp* [1935] P 134; *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Co Ltd* [1947] AC 46, PC. As to the effect of a clause that the weight, measure, contents, quality, condition or value are unknown see *Martineaus Ltd v Royal Steam Packet Co Ltd* supra; *Hogarth Shipping Co Ltd v Blyth, Greene, Jourdain & Co Ltd* [1917] 2 KB 534, CA; *The Tromp* supra; *The Skarp* supra; *Tokio Marine and Fire Insurance Ltd v Retla Steamship Co* [1970] 2 Lloyd's Rep 91; and CARRIAGE AND CARRIERS.

3 See the Carriage of Goods by Sea Act 1924 s 4; and CARRIAGE AND CARRIERS vol 7 (2008) PARA 317. This statutory estoppel does not bind the owner (*Brown v Powell Duffryn Steam Coal Co* (1875) LR 10 CP 562, applying *McLean and Hope v Fleming* (1871) LR 2 Sc & Div 128, HL), but the bill of lading is evidence (*Smith & Co v Bedouin Steam Navigation Co* [1896] AC 70, HL; *Sanday v Strath Steamship Co* (1921) 90 LJB 1349, CA), and may by agreement be conclusive evidence against him (*Lishman v Christie* (1887) 19 QBD 333, CA; *Crossfield & Co v Kyle Shipping Co Ltd* [1916] 2 KB 885, CA) (all decided under the Bills of Lading Act 1855 s 3 (repealed)). In a claim for lump sum freight against an indorsee, the master is not estopped by the statement of weight in the bill (at least where it is merely a matter of measurement, which may vary after the goods are put on board) from proving that he delivered all the goods that were shipped (*Blanchet v Powell's Llantivitt Collieries Co Ltd* (1874) LR 9 Exch 74), although it might be otherwise in a claim for short delivery (*Blanchet v Powell's Llantivitt Collieries Co Ltd* supra at 77). In a claim for non-delivery the person signing the bill of lading is not estopped from showing that mere identification marks were incorrectly stated therein. If the identity of the goods can be established by other means, such marks become immaterial: *Parsons v New Zealand Shipping Co* [1901] 1 KB 548, CA. As to the effect of statements in bills of lading resulting from making the Hague-Visby Rules terms of the bills see CARRIAGE AND CARRIERS vol 7 (2008) PARAS 317, 380.

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### **1057. Statements in agents' accounts.**

A somewhat special case of a statement giving rise to an estoppel by representation occurs in regard to agents accounting to their principals<sup>1</sup>. An agent who in his account makes a false statement either increasing his apparent receipts<sup>2</sup>, or reducing his apparent expenditure so as to swell the credit<sup>3</sup>, or diminish his principals' debit, does so at his peril; and, unless he shows that it was by mistake, he is not at liberty afterwards to recover the amounts from them, even though it does not appear that they have acted on his erroneous statement. If it is shown that they have done so, the same result follows on the ordinary principles of estoppel<sup>4</sup>.

1 See AGENCY vol 1 (2008) PARA 82 et seq (agents' accounts), paras 95-96 et seq (estoppel operating against an agent as respects his principal).

2 *Shaw v Picton* (1825) 4 B & C 715.

3 *Cave v Mills* (1862) 7 H & N 913, applying *Shaw v Picton* (1825) 4 B & C 715.

4 *Skyring v Greenwood* (1825) 4 B & C 281 at 290; *Cave v Mills* (1862) 7 H & N 913. An insurance broker who, in accordance with the usage of Lloyd's, has settled a loss by allowance in account in such manner as to deprive his principal of all remedy against the underwriter, cannot as against his principal deny the receipt of the money: *Andrew v Robinson* (1812) 3 Camp 199; and see INSURANCE vol 25 (2003 Reissue) PARA 85. There would seem to be no reason why estoppel arising from entries in a passbook should not equally apply to bank statements. For a consideration of the history of the passbook, the predecessor to the bank statement, see *Devaynes v Noble, Clayton's Case* (1816) 1 Mer 529 at 535; *Commercial Bank of Scotland v Rhind* (1860) 3 Macq 643; and see further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 791 et seq.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(i) The Representation/C. REPRESENTATION MADE BY CONDUCT/(A) In General/1058. Conduct; in general.

### ***C. REPRESENTATION MADE BY CONDUCT***

#### **(A) IN GENERAL**

##### **1058. Conduct; in general.**

The question whether a course of conduct, negligent or otherwise, amounts to a representation, or is such as a reasonable person would take to be a representation meant to be acted on in a certain way, must vary with each particular case. With certain exceptions no general rules can be laid down for answering it. A party will not, however, be held to be estopped unless his conduct is unequivocal<sup>1</sup>.

The acceptance of money paid in consideration of the existence of a certain state of things often estops the receiver, in the absence of some cause unknown to him entitling him to terminate it, from denying the existence of that state of things, and affords conclusive evidence of a waiver of any objection to the contract or other matter in respect of which it is paid. Thus the acceptance of premiums with knowledge of circumstances entitling the insurer to avoid the policy estops him from averring that for that reason it is not a valid policy<sup>2</sup>. The estoppel raised between landlord and tenant by the acceptance of rent on the one hand, and of an estate on the other, has already been discussed<sup>3</sup>. Although the tendering of payment under a contract may amount to a representation that the tenderer believes the sums are due, it does not, however, amount to a representation of the parties' rights under the contract<sup>4</sup>.

The acceptance of money is by no means the only conduct which may be relied on as conclusive evidence of waiver of an irregularity or other ground of objection to a case set up<sup>5</sup>. Thus a person who, acting as director of a company, takes part in confirming the allotment of shares to himself, cannot, in a claim for calls, be heard to say that his appointment as director or the allotment of shares was irregular<sup>6</sup>.

Parties to litigation who have continued the proceedings with knowledge<sup>7</sup> of an irregularity of which they might have availed themselves are estopped from afterwards setting it up<sup>8</sup>; and on a somewhat different principle, such a party cannot take advantage of an error to which he has himself contributed<sup>9</sup>. Where, however, an objection to the jurisdiction of an inferior court appears on the face of the proceedings, a party who consented to the exercise of the jurisdiction is not thereby estopped from afterwards raising the objection<sup>10</sup>, since the jurisdiction of a court of limited jurisdiction cannot be enlarged by estoppel<sup>11</sup>.

Conduct may give rise to an estoppel by representation where one person has held out another as his agent to do a certain class of acts, either by allowing him to appear as his agent when he was not<sup>12</sup>, or as having a greater authority than he in fact has<sup>13</sup>, or by omitting to give notice that his authority has been withdrawn. The agency by estoppel which is said to arise in such circumstances is discussed elsewhere in this work<sup>14</sup>. Just as a person may estop himself from denying that a transaction entered into by an ostensible agent was for his account, so a principal may be precluded from asserting that fact; and the rule<sup>15</sup> that a person who purchases from, or otherwise gives credit to, an agent under the belief induced by the principal's conduct or authority that the agent is dealing on his own account is entitled to set off his debt against the agent's debt to him rests on the doctrine of estoppel<sup>16</sup>.

The commercial law attributed to those who put their names to negotiable instruments certain representations as necessarily implied from their conduct in doing so; and, as every holder in

good faith of such instruments is deemed to have given faith to the signatures on the bill when he took it, each of the previous signatories is estopped as against him from denying the truth of those representations<sup>17</sup>.

1 *Peyman v Lanjan*[1985] Ch 457, [1984] 3 All ER 703, CA.

2 *Wing v Harvey* (1854) 5 De GM & G 265 (breach of residence condition in life policy); *Edwards v Aberayron Mutual Ship Insurance Society*(1876) 1 QBD 563, Ex Ch; *Jones v Bangor Mutual Shipping Insurance Society* (1889) 61 LT 727; *Roumeli Food Stores (NSW) Pty Ltd v New India Assurance Co Ltd* [1972] 1 NSWLR 227; and see *Herman v Royal Exchange Shipping Co and Patton, Jr & Co* (1884) Cab & El 413 (after accepting freight on goods shipped under bills of lading in their printed forms, persons were held to be estopped from saying that the ship was not theirs, that the master was not their agent, and that the contract was not with them); *Re Coltman, Coltman v Coltman*(1881) 19 ChD 64, CA (surety for loan by friendly society could not object that it was ultra vires); *Exchange Bank of Yarmouth v Blethen*(1885) 10 App Cas 293, PC (acceptance of payment under composition deed estops creditor from denying execution) (cf *Dunn v Wyman* (1881) 51 LJQB 623 (creditor not allowed to say deed was void)); *Bradshaw v McMullan*[1920] 2 IR 412 at 419, HL (acceptance by a creditor, in payment of a recurring liability, of a sum less than he is entitled to demand, does not forever estop him from insisting upon being paid what is legally due to him in respect of future payments); *Godfrey Phillips Ltd v Investment Trust Corp Ltd*[1953] Ch 449, [1953] 1 All ER 7 (dividend on cumulative preference shares had been underpaid over a period of years through the use of the wrong method of computing dividend; no representation of fact on the shareholders' part on which to create an estoppel) (distinguishing *Matthews v Great Northern Rly Co* (1859) 28 LJ Ch 375); *MacLaine v Gatty*[1921] 1 AC 376, HL (creditor who, under an agreement to accept interest at a lower rate on punctual payment, had on one occasion accepted interest at the lower rate after the agreed date, not estopped from insisting on his right to have payment at the higher rate on a subsequent failure to make punctual payment); *Ruby Steamship Corp v Commercial Union Assurance Co* (1933) 46 Ll L Rep 265, CA (claims on a set of policies prevented by benefits taken under policies substituted in the valid belief that the first policies were validly cancelled); *Gwyther v Boslymon Quarries Ltd*[1950] 2 KB 59, [1950] 1 All ER 384 (person entitled to payments from which the payer had wrongfully deducted tax, without objection from the payee, estopped from demanding payment of the amount of tax wrongfully deducted for which the payer had accounted to the Inland Revenue).

3 As to estoppels between landlord and tenant see PARA 1031 et seq ante.

4 See *Philip Collins Ltd v Davis* [2000] 3 All ER 808, [2000] IP & T 1167.

5 See eg *Jennings v Great Northern Rly Co*(1865) LR 1 QB 7 (railway undertaking, having delivered to an employer the tickets taken for his employees, precluded from enforcing against the employees a byelaw requiring passengers to produce their tickets); *Thomas v Brown*(1876) 1 QBD 714 at 722 (estoppel by conduct in investigation of title from denying existence of contract); *Else v Barnard, ex p Courtauld* (1860) 28 Beav 228 (purchaser estopped from objecting that sale was not by auction); *Wright v John Bagnall & Sons Ltd*[1900] 2 QB 240, CA (employer admitting statutory liability to pay compensation estopped from raising the defence that the claim was not brought within the prescribed time); *Burgoyne & Co v Godfree & Co* (1904) 22 RPC 168, CA (conduct of a shipper in selling wine branded with his name prevented his complaining of the act of a purchaser in selling it as the shipper's wine); *Jackson v Knutsford Urban Council*[1914] 2 Ch 686 at 696 (having entered into a bargain by which they agreed not to object to part of a building being treated as an obstruction, plaintiffs estopped from alleging that no part of the building was an obstructive building); *Yorkshire Insurance Co v Craine*[1922] 2 AC 541, PC (insurers, taking possession under a salvage clause in a fire insurance policy, estopped from relying on non-fulfilment of the requirements of an interdependent condition as to delivery of particulars of the claim); *Burrough's Adding Machine Ltd v Aspinall* (1925) 41 TLR 276, CA (agent, not having objected to accounts in accordance with the terms of an agreement, estopped from alleging that the accounts were not final and conclusive); *Re National Benefit Assurance Co Ltd*[1932] 2 Ch 184 (company, in allowing another company's policies to be issued with indorsements to the effect that the fulfilment of the liabilities arising under them was guaranteed, estopped from asserting that the liabilities were not in fact guaranteed); *Dunn v Shanks*[1932] NI 66, CA (former owner of a business who had omitted to give notice of the transfer of the business and continued to attend to it was estopped from denying that he was the owner); *W Davis (Spitalfields) Ltd v Huntley*[1947] 1 All ER 246; affd on appeal [1947] 2 All ER 371, CA (tenant claiming a new lease under the Landlord and Tenant Act 1927 s 5 (repealed) estopped from claiming that the old tenancy was still subsisting); *Hopgood v Brown*[1955] 1 All ER 550 at 559, [1955] 1 WLR 213 at 223, CA (successor in title of a landowner who had permitted an adjoining owner to encroach over a boundary with a permanent erection was estopped from claiming damages in respect of such encroachment); *Nana Ofori Atta II v Nana Abu Bonsra II*[1958] AC 95, [1957] 3 All ER 559, PC; followed in *Osborne v Smith* (1960) 34 ALJR 368, HC of A (a person who stands by while a question of title is fought by someone else having the same interest is estopped from litigating the matter afresh); *Panchaud Frères SA v Ets General Grain Co* [1970] 1 Lloyd's Rep 53, CA (acceptance of shipping documents revealing fact of late shipment precluded buyers from later rejecting goods on ground of late shipment).



Cf *Deeley v Lloyds Bank*[1912] AC 756, HL (circumstances in which second mortgagee held not estopped from asserting that first mortgage had lost priority); *London and Manchester Plate Glass Co Ltd v Heath*[1913] 3 KB 411, CA (insurers who had paid under a policy without demur not estopped from denying liability in similar circumstances under a subsequent policy in the same words); *Gray v Blackmore*[1934] 1 KB 95 (circumstances in which insurers held not estopped by having issued a certificate of insurance under road traffic legislation from denying that the assured was insured); *Veitch v Caldicott* (1945) 173 LT 30 (circumstances in which trustee of deed of arrangement not estopped from claiming proceeds of sale of debtor's house in which he had been allowed to remain); *Swallow and Pearson v Middlesex County Council*[1953] 1 All ER 580, [1953] 1 WLR 422 (application for planning permission after receipt of an enforcement notice did not estop right to deny validity of notice). As to a suggestion that a party to a marriage may be estopped by his conduct from later alleging that the marriage is void see *Bullock v Bullock*[1960] 2 All ER 307 at 310-311, [1960] 1 WLR 975 at 979 per Lord Merriman P.

As to whether an occupier of land is estopped from relying on adverse possession to defeat the owner's title following a compromise agreement see *Colchester Borough Council v Smith* [1992] Ch 421, [1992] 2 All ER 561, CA. See also *Keepers and Governors of the Possessions Revenues and Goods of the Free Grammar School of John Lyon v Mayhew*[1997] 1 EGLR 88, [1997] 17 EG 163, CA (a tenant who treats as valid a notice to terminate a business tenancy is estopped from later claiming that the notice is invalid).

6 *York Tramways Co v Willows*(1882) 8 QBD 685 at 699, CA; followed in *Faure Electric Accumulator Co Ltd v Phillipart* (1888) 58 LT 525; cf *Benson v Hadfield* (1844) 4 Hare 32 (insufficiency of board); *Jones v North Vancouver Land and Improvement Co*[1910] AC 317, PC; *Hull Flax and Cotton Mill Co v Wellesley* (1860) 6 H & N 38 (receipt of dividends estoppel in action for calls; but in this instance there was also estoppel by deed); *Re St George's Steam Packet Co, Maguire's Case* (1849) 3 De G & Sm 31; *Barrow Mutual Ship Insurance Co v Ashburner* (1885) 54 LJQB 377, CA; distinguish *Tyne Mutual Steamship Insurance Association v Brown* (1896) 74 LT 283 (no real representation at all); and see COMPANIES vol 14 (2009) PARA 486.

7 The knowledge is essential; thus a party is not estopped, by appearing and conducting proceedings before the other party's arbitrator in ignorance that he was not properly qualified, from afterwards denying his jurisdiction, even though his own arbitrator is not qualified either; but he will not be allowed to deny his own arbitrator's jurisdiction: *Oakland Metal Co Ltd v Benaim & Co Ltd*[1953] 2 QB 261, [1953] 2 All ER 650; and see *Toronto Rly Co v Toronto Corp*n[1904] AC 809 at 815, PC (objection of want of jurisdiction not waived by party having set the tribunal in motion).

8 *Tyerman v Smith* (1856) 6 E & B 719; *Andrews v Elliott* (1855) 5 E & B 502; affd (1856) 6 E & B 338, Ex Ch; *Shrager v Basil Dighton Ltd*[1924] 1 KB 274, CA; *Oakland Metal Co Ltd v D Benaim & Co Ltd*[1953] 2 QB 261, [1953] 2 All ER 650; cf *Haines v East India Co* (1856) 11 Moo PCC 39.

9 *Meredith v Hodges* (1807) 2 Bos & PNR 453; *Price v Harwood* (1811) 3 Camp 108; *Walker v Willoughby* (1816) 6 Taunt 530; *Reeves v Slater* (1827) 7 B & C 486; *Cox v Cannon* (1838) 4 Bing NC 453; *Fisher v Magnay* (1843) 5 Man & G 778; and see *Oakland Metal Co Ltd v D Benaim & Co Ltd*[1953] 2 QB 261, [1953] 2 All ER 650; cf *Hewlett v LCC*(1908) 72 JP 136; *Maidlow v Maidlow*[1914] P 245, CA (wife, having petitioned to vary a consent order for permanent maintenance, but having withdrawn the petition on discovery of mistake, not estopped from asserting that the order could not be varied); *Harris v Harris*[1952] 1 All ER 401, DC.

10 *Farquharson v Morgan*[1894] 1 QB 552, CA; *Simpson v Crowle*[1921] 3 KB 243.

11 See PARA 951 note 5 ante.

12 *Ie* as in *Cornish v Abington* (1859) 4 H & N 549; *Waller v Drakeford* (1853) 1 E & B 749; cf *Miles v Furber*(1873) LR 8 QB 77. As to partnership by estoppel see *Mollwo, March & Co v Court of Wards*(1872) LR 4 PC 419 at 435; the Partnership Act 1890 s 14; and PARTNERSHIP. As to the liability of a retired partner to those who have contracted with the firm in ignorance of his retirement and on the faith of his continuing authority see *Freeman v Cooke*(1848) 2 Exch 654; and see the Partnership Act 1890 s 36; and PARTNERSHIP.

13 A patentee may be estopped by holding out an agent as authorised to sell a patented article free from conditions from insisting as against a purchaser from the agent that he had no such authority: *Incandescent Gas Light Co Ltd v Cantelo* (1895) 12 RPC 262, as explained in *Badische Anilin and Soda Fabrik v Isler*[1906] 1 Ch 605 at 611 per Buckley J; affd [1906] 2 Ch 443, CA.

14 See AGENCY vol 1 (2008) PARAS 25-26. A statutory extension of the doctrine of agency by estoppel is provided by the Factors Act 1889 s 2, enabling a mercantile agent acting in the ordinary course of his business as such, who, with the owner's consent, is in possession of goods or documents of title to goods, to make a valid disposition of them by way of pledge, sale or exchange to persons taking in good faith and without notice of any want of authority: see AGENCY vol 1 (2008) PARA 148. Corresponding provisions protect persons dealing with others who are entrusted with goods for consignment or sale (see the Factors Act 1889 s 7; and LIEN vol 68 (2008) PARA 830); with vendors who are suffered to retain possession of goods or documents of title; and with buyers who are given premature possession of them (see s 8, s 9 (as amended); and SALE OF GOODS AND SUPPLY OF SERVICES vol 41 (2005 Reissue) PARAS 157-158).

A further development of the doctrine of agency by estoppel is that one who provides an authorised agent with the indicia of an authority in excess of his actual authority cannot, as against persons who, in dealing with him in good faith, have altered their position on the faith of such indicia, deny that he had the larger authority. This rule has been illustrated in cases relating to negotiable instruments of which material parts have been left blank, where the agent has completed the blanks in an unauthorised manner: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 791 et seq, 1576. Where an owner or pledgee of goods hands a delivery order with blanks in it to an agent with authority to fill them up, he will be estopped as against the warehouseman who has acted on it from proving that the authority was subject to a limit which has been exceeded: see *Union Credit Bank Ltd v Mersey Docks and Harbour Board, Union Credit Bank Ltd v Mersey Docks and Harbour Board and North and South Wales Bank*[1899] 2 QB 205, as discussed in *London Joint Stock Bank v Macmillan and Arthur*[1918] AC 777 at 793, 833, HL, and dissenting from the opinion given in the headnote to *Swan v North British Australasian Co* (1863) 2 H & C 175, Ex Ch, that estoppel by executing instruments in blank is confined to negotiable instruments.

Although mere parting with possession of a chattel, or of a document of title other than a negotiable instrument, does not estop the owner from setting up his title against a purchaser for value (see PARA 1067 post), it is otherwise where an owner either by giving authority to some person to deal with goods as his own (see *Weiner v Harris*[1910] 1 KB 285 at 295, CA per Farwell LJ), or by neglect of some duty of precaution which he owes to those who may deal with that person, enables that other to hold himself out as having not only the possession but also the property: *Henderson & Co v Williams*[1895] 1 QB 521 at 525, 529, CA; *Babcock v Lawson*(1879) 4 QBD 394 (affd but not on this point (1880) 5 QBD 284, CA); *National Mercantile Bank v Hampson*(1880) 5 QBD 177; *Law v MacGill* (1864) 10 LT 495; cf *Higgon's v Burton* (1857) 26 LJ Ex 342 at 343 per Martin B; *Waller v Drakeford* (1853) 1 E & B 749. *Kingsford v Merry* (1856) 1 H & N 503; Ex Ch, seems to have been decided on a view of the facts which did not sufficiently regard this aspect of them: see *Henderson & Co v Williams* supra at 526-527. See also *France v Clark*(1884) 26 ChD 257 at 264, CA; *Fine Art Society v Union Bank of London Ltd*(1886) 17 QBD 705 at 710, CA, per Lord Esher MR; *Mercantile Bank of India Ltd v Central Bank of India Ltd*[1938] AC 287, [1938] 1 All ER 52, PC, dissenting from *Commonwealth Trust v Akotey*[1926] AC 72, PC; *Eastern Distributors Ltd v Goldring*[1957] 2 QB 600, [1957] 2 All ER 525, CA (owner of a van who gave documents to another to enable that other to represent that he owned the van estopped from denying the other's authority to sell the van); *Stoneleigh Finance Ltd v Phillips*[1965] 2 QB 537, [1965] 1 All ER 513, CA (estoppel by warranty in hire purchase documents); *Snook v London and West Riding Investments Ltd*[1967] 2 QB 786, [1967] 1 All ER 518, CA; cf *Mercantile Credit Co Ltd v Hamblin*[1965] 2 QB 242, [1964] 3 All ER 592, CA (owner had no reason to suppose that anyone would be deceived).

As to estoppel by negligent conduct and the necessity of the existence of a duty towards the person seeking to raise an estoppel see PARA 1061 post. Where, for example, a person hands to another a document purporting on its face to be transferable by delivery, he thereby represents that it will pass with a good title to anyone who takes it in good faith and for value, and is estopped as against any such person from denying its negotiability: *Goodwin v Roberts*(1876) 1 App Cas 476, HL; *Rumball v Metropolitan Bank*(1877) 2 QBD 194. This proposition was one of the grounds of decision in both these cases; in neither, however, was it a necessary ground, as the documents were in each case held to be in fact negotiable. Its correctness was doubted in *Colonial Bank v Cady and Williams, London Chartered Bank of Australia v Cady and Williams*(1890) 15 App Cas 267 at 282, HL, by Lord Bramwell; cf *Re South Essex Estuary Co, ex p Chorley*(1870) LR 11 Eq 157 (company, having transferred Lloyd's bonds to a contractor with the intention that they should be assignable, estopped from disputing his title as against a purchaser from him); and see *Crouch v Crédit Foncier of England*(1873) LR 8 QB 374 at 384 (the decision in which was treated as overruled by *Goodwin v Roberts* supra in *Bechuanaland Exploration Co v London Trading Bank*[1898] 2 QB 658); *Bentinck v London Joint Stock Bank*[1893] 2 Ch 120 at 144-145; *Fuller v Glyn, Mills, Currie & Co*[1914] 2 KB 168 (owner of share certificates who had not actually signed the transfers with his own hand, but allowed his broker to keep possession of the certificates, which he knew were transferable without any act on his part, estopped from disputing the title of one who in good faith took the documents as transferee from the broker. See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1618).

Where a person has been entrusted with documents of title with authority to raise money on them, the owner of the documents cannot take advantage of any limitation of amount which he placed upon the authority to raise money as against a lender who had no notice of it and who has relied on the documents; and the same principle has been applied where the person entrusted with the documents, who has authority to deal with them by way of sale but not to borrow, uses them to obtain an advance for himself: see eg *Brocklesby v Temperance Permanent Building Society*[1895] AC 173, HL; *Rimmer v Webster*[1902] 2 Ch 163; FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 791 et seq; and MORTGAGE vol 77 (2010) PARA 285.

15 *George v Clagett* (1797) 7 Term Rep 359; 2 Smith LC (13th Edn) 131; and see AGENCY vol 1 (2008) PARA 133. An agent may accordingly estop himself from denying that he contracted as principal: *Gurney v Evans* (1858) 3 H & N 122. As to the position of an agent who makes a contract on behalf of a foreign principal see AGENCY vol 1 (2008) PARA 129.

16 *Cooke & Sons v Eshelby*(1887) 12 App Cas 271 at 278, HL, per Lord Watson, quoting Bowen LJ in the lower court (not reported); Lord Fitzgerald expressed doubts in regard to the proposition. The rule was acted on in *Montagu v Forwood*[1893] 2 QB 350, CA, in favour of a person who collected average contributions for an

apparent principal who was indebted to him, applying *George v Clagett* (1797) 7 Term Rep 359; *Rabone v Williams* (1785) 7 Term Rep 360n; recognised in *Fish v Kempton* (1849) 7 CB 687.

17 See the Bills of Exchange Act 1882 ss 54(2), 55, 88(2); and FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1451 et seq.

The act of a person in signing as acceptor a fictitious document in the shape of a bill of exchange expressed to be payable at his bank so accredits the document as genuine that the bank is entitled, as his agent, to be indemnified by its customer against the consequences of payment to a person presenting the document with the apparent indorsement of the supposed payee; and the case is strengthened where, besides attaching his signature to the bill, the customer has advised the bank that it is coming forward for payment: see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 791 et seq, 1431, 1568.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(i) The Representation/C. REPRESENTATION MADE BY CONDUCT/(B) Silence/1059. Silence or inactivity when duty to speak or act.

## (B) SILENCE

### **1059. Silence or inactivity when duty to speak or act.**

In the absence of a duty to speak, mere silence or inaction is not such conduct as amounts to a representation<sup>1</sup>. If a person's consent to a particular act is required, he may be under a duty, when he knows that it has been done without his consent, not to stand by for so long that others are induced thereby to do that from which otherwise they might have abstained; and he cannot afterwards question the legality of the act to the prejudice of those who have so given faith to the fair inference to be drawn from his conduct<sup>2</sup>.

A duty to speak arises whenever a person knows that another is acting on an erroneous assumption of some authority given or liability undertaken by the former<sup>3</sup>, or is dealing with or acquiring an interest in property in ignorance of his title to it<sup>4</sup>. It is the duty of a person who knows that another is relying on a document bearing a counterfeit of his signature to give notice of the forgery without delay<sup>5</sup>. Thus the receipt of an invoice indicating that a tradesman has been supplying goods in the erroneous belief that the recipient has authorised their purchase imposes on him the duty of at once correcting the error<sup>6</sup>. It is the duty of a person who by his own mistake has led another into an erroneous belief to correct it as soon as the mistake has been discovered<sup>7</sup>, and one who culpably stands by and allows another to hold himself out to the world as the owner of property, and thereby to sell it to a buyer in good faith, cannot afterwards assert his title against the buyer<sup>8</sup>. A person who fails to enforce his intellectual property rights against another for a long period may be estopped from enforcing them thereafter<sup>9</sup>. A person who stands by and allows another to proceed with a scheme which interferes with his legal rights, in the hope and belief that an arrangement can ultimately be come to between them, is not, however, estopped from asserting that the scheme is outside that other's statutory powers when it is found that no satisfactory arrangement can be come to<sup>10</sup>.

It has been held that failure to submit information regarding the community charge<sup>11</sup> in breach of the relevant regulations is not sufficient to amount to an estoppel by representation preventing an occupier from claiming adverse possession of a property by reference to his occupation for the period during which he was not registered as the occupier for the purposes of that charge<sup>12</sup>.

With regard to promissory estoppel, mere inactivity is usually<sup>13</sup> insufficient to attract the *High Trees* doctrine<sup>14</sup>, as where there is a mere failure to litigate a claim that both parties regarded as hopeless<sup>15</sup>.

Just as it has been held that, where a person interested in property, whether as owner or incumbrancer, has stood by while another has purchased what he supposed to be a good title to the property, the person so standing by cannot afterwards set up his title against the innocent purchaser<sup>16</sup> or a person deriving title under him<sup>17</sup>, so the innocent purchaser of a chattel from a person having no title to it is entitled, as against the true owner, to an allowance for work done upon it while it is in his possession<sup>18</sup>.

1 *Greenwood v Martins Bank Ltd*[1933] AC 51 at 57, HL; *Proctor v Bennis*(1887) 36 ChD 740 at 761, CA (patentee not bound to give notice of his patent rights unless he knows another person is acting and spending his money in ignorance of them); *Polak v Everett*(1876) 1 QBD 669 at 675, CA, per Blackburn J; *Barton v London and North Western Rly Co*(1889) 24 QBD 77, CA; *Re the Local Government Superannuation Acts 1937 and 1939*,

*Algar v Middlesex County Council*[1945] 2 All ER 243 at 251, DC per Humphreys J; *Welch v Bank of England*[1955] Ch 508 at 538, [1955] 1 All ER 811 at 824-825 (not answering letter); *Leslie & Co v Works Comrs*(1914) 78 JP 462 (party to contract not estopped from denying its true construction by failing to answer a letter in reference to its meaning); *Re Lewis, Lewis v Lewis*[1904] 2 Ch 656, CA (executor not bound to disclose gift over to himself); *Sheridan v New Quay Co* (1858) 4 CBNS 618 at 648-649; *British Linen Co v Cowan* (1906) 8 F 704; *Fairfield Shipbuilding and Engineering Co Ltd v Gardner, Mountain & Co Ltd* (1911) 104 LT 288 (insurance brokers, being under no duty to disclose to shipowner the amount of premiums unpaid, not estopped from alleging that cash portion of premium was in fact unpaid); *Bristol Corp v Sinnott*[1918] 1 Ch 62, CA; *Jones Bros (Holloway) Ltd v Woodhouse*[1923] 2 KB 117, DC (owner of chattels let to hirer not bound to give notice, before sale, to sheriff as agent of judgment creditor of claim to chattels); cf *Provincial Insurance Co of Canada v Leduc*(1874) LR 6 PC 224; *Pearl Mill Co v Ivy Tannery Co*[1919] 1 KB 78 (acquiescence in rescission of contract); *Bank of Montreal v Dominion Gresham Guarantee and Casualty Co Ltd*[1930] AC 659, PC; *Canadian Bank of Commerce v London and Lancashire Guarantee and Accident Co of Canada* (1958) 14 DLR (2d) 623 (insurance company not estopped from denying liability in respect of action against insured by its failure to protest when insured, in breach of a condition in the policy, sent the writ in the action to another insurance company); *West Country Cleaners (Falmouth) Ltd v Saly*[1966] 3 All ER 210, [1966] 1 WLR 1485, CA (landlord under no duty to complain of breach of decorating covenants so as to estop him from refusing to renew the lease under an option to do so conditional on the tenant's compliance with the covenants); *Moorgate Mercantile Co Ltd v Twitchings*[1976] QB 225 at 245, [1975] 3 All ER 314 at 326, CA, per Browne LJ; revsd on another point [1977] AC 890, [1976] 2 All ER 641, HL.

As to the equitable doctrine of acquiescence which is founded on the jurisdiction of the courts of equity to relieve against fraud and which operates by way of estoppel to prevent a person who refrains from interfering while a violation of his legal rights is in progress from taking advantage of his conduct to the disadvantage of the other see EQUITY vol 16(2) (Reissue) PARA 909.

2 *Greenwood v Martins Bank Ltd*[1933] AC 51, HL; *Cairncross v Lorimer* (1860) 3 Macq 827 at 829, HL (members of congregation precluded from maintaining an action for property which had been enjoyed by a Free Church minister who had been inducted with their acquiescence); *Millard v Humphreys* (1918) 62 Sol Jo 505 (landlord precluded, by his acquiescence to assignment of premises, from asserting that the assignment had been made without his written consent); cf *Rule v Jewell*(1881) 18 ChD 660, following *Prendergast v Turton* (1841) 1 Y & C Ch Cas 98 (on appeal (1843) 13 LJ Ch 268), which was distinguished in *Clarke and Chapman v Hart* (1858) 6 HL Cas 633, the principle being approved at 670 per Lord Wensleydale, citing also *Norway v Rowe* (1812) 19 Ves 144 (irregular forfeiture of shares in cost-book mining company); cf *Jones v North Vancouver Land and Improvement Co*[1910] AC 317, PC. In order that a person may be precluded by acquiescence from asserting his legal rights against another, however, it is necessary that he should be fully aware of the course the other is pursuing: *Lynch v London Sewers Comrs*(1886) 32 ChD 72, CA; and see *Deeley v Lloyds Bank*[1912] AC 756, HL.

3 *Spiro v Lintern*[1973] 3 All ER 319 at 327-328, [1973] 1 WLR 1002 at 1010-1011, CA (husband's failure to inform an intending purchaser that his wife had no authority to enter into a contract of sale precluded the husband from later asserting that the contract had been entered into without his authority).

4 *Stroud v Stroud* (1844) 7 Man & G 417; *Armstrong v Sheppard and Short Ltd*[1959] 2 QB 384 at 396, [1959] 2 All ER 651 at 656, CA, per Lord Evershed MR (no estoppel against asserting right of which the proprietor was unaware at the time the right was infringed); *Deveney v Crampsey* (1967) 62 DLR (2d) 244, Ont CA; affd sub nom *Crampsey v Deveney* (1968) 2 DLR (3d) 161, Can SC (no estoppel against persons unaware of the exact nature of their rights). See also EQUITY vol 16(2) (Reissue) PARA 909.

5 *M'Kenzie v British Linen Co*(1881) 6 App Cas 82 at 109, HL; *Greenwood v Martins Bank Ltd*[1933] AC 51, HL. He may, however, excuse himself for delay by showing that the other is in no worse position in consequence of it: *M'Kenzie v British Linen Co* supra; *Fung Kai Sun v Chan Fui Hing*[1951] AC 489, PC. See also *Ogilvie v West Australian Mortgage and Agency Corp*[1896] AC 257, PC; *William Ewing & Co v Dominion Bank*[1904] AC 806, PC; *Brown v Westminster Bank Ltd* [1964] 2 Lloyd's Rep 187 (customer estopped from denying that amounts in forged cheques were rightly debited to her account by her failure, when questioned by the bank manager, to inform the bank that the cheques were forgeries); *Ontario Woodsworth Memorial Foundation v Grozbord* (1966) 58 DLR (2d) 21, Ont CA. See further FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 791 et seq, 1503.

6 *Cornish v Abington* (1859) 4 H & N 549; *Povey v Taylor* (1966) 116 NLJ 1656, CA.

7 *Skyring v Greenwood* (1825) 4 B & C 281 (army agents erroneously crediting customer with money not received); *Holt v Markham*[1923] 1 KB 504, CA (similar case); and see CIVIL PROCEDURE vol 11 (2009) PARA 669. Cf *Ashby v Day* (1886) 54 LT 408, CA (duty of directors, guarantors of company's liability, to communicate change in the identity of the company; they were estopped from insisting that the guarantee had been put an end to by the change).

8 *Gregg v Wells* (1839) 10 Ad & El 90; *Law v McGill* (1864) 10 LT 495; *Richards v Johnston* (1859) 4 H & N 660; *Waller v Drakeford* (1853) 1 E & B 749. The difficulty arises in applying the principle, and determining what degree of standing by is culpable. 'Culpably' is not equivalent to 'knowingly', although knowingly to stand by

would be culpable, and in most cases fraudulent. It appears to mean 'under circumstances creating a duty in the true owner to guard against the person in possession making a dishonest use of his opportunities': see PARA 1061 note 3 post. See, on the one hand, *Henderson & Co v Williams*[1895] 1 QB 521, CA, and, on the other, *Kingsford v Merry* (1856) 1 H & N 503, Ex Ch; and *Farquharson Bros & Co v King & Co*[1902] AC 325, HL. As to the operation of the equitable doctrine of acquiescence, which is founded on fraud, in the circumstances stated in the text, see also EQUITY vol 16(2) (Reissue) PARA 909; and as to proprietary estoppel see PARA 1089 et seq post.

9 See *Beckingham (aka Valentino) v Hodgins* [2003] EWCA Civ 143, [2003] All ER (D) 247 (Feb), [2003] EMLR 376.

10 *Jackson v Knutsford Urban Council*[1914] 2 Ch 686 at 696 obiter per Eve J.

11 As to the replacement of the community charge by council tax with effect from 1 April 1993 see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 2.

12 *Ellis v Lambeth London Borough Council* (1999) 32 HLR 596, [1999] All ER (D) 768, CA. As to adverse possession of registered land see now the Land Registration Act 2002 Pt 9 (ss 96-98, Sch 6); *Land Registration for the Twenty-First Century, a Conveyancing Revolution* (Law Com no 271) (2001) PARA 14.6; and LAND REGISTRATION.

13 Except, presumably, where the law imposes a duty to speak out.

14 *Amherst v James Walker Goldsmith & Silversmith Ltd*[1983] Ch 305 at 315, [1983] 2 All ER 1067 at 1074, CA, per Oliver LJ.

15 *Collin v Duke of Westminster*[1985] QB 581, [1985] 1 All ER 463, CA. As to promissory estoppel see PARA 1082 et seq post.

16 'For it was apparent fraud in him to give notice of his title to the intended purchaser': *Savage v Foster* (1723) 9 Mod Rep 35; and see *Hobbs v Norton* (1682) 1 Vern 136; *Clare v Earl of Bedford* (prior to 1690) 13 Vin Abr 536, cited in *Hunsden v Cheyney* (1690) 2 Vern 150 at 151, and in *Earl Montague v Earl of Bath* (1693) 3 Cas in Ch 55 at 85, 104; *Berrisford v Milward* (1740) 2 Atk 49; *Nicholson v Hooper* (1838) 4 My & Cr 179 at 185-186; *Boyd v Belton* (1844) 1 Jo & Lat 730; *Stronge v Hawkes* (1853) 4 De GM & G 186 at 196; *Olliver v King* (1856) 8 De GM & G 110; *Edmands v Best* (1862) 7 LT 279; *Spiro v Lintern*[1973] 3 All ER 319, [1973] 1 WLR 1002, CA; cf *Vaughan v Vanderstegen* (1854) 2 Drew 363; *Sharpe v Foy*(1868) 4 Ch App 35; *Re Lush's Trusts*(1869) 4 Ch App 591. On the traditional analysis, ignorance of his title on the part of the person standing by prevents the estoppel being raised against him (*Dyer v Dyer* (1682) 2 Cas in Ch 108), but not in the case of a marriage settlement (at any rate where he is a near relation of one of the spouses: *Teasdale v Teasdale* (1726) Cas temp King 59; and see *Olliver v King* supra at 118), nor necessarily in a case of acquiescence by a beneficiary in a breach of trust: see note 1 supra.

17 *Nicholson v Hooper* (1838) 4 My & Cr 179.

18 *Peruvian Guano Co Ltd v Dreyfus Bros & Co*[1892] AC 166 at 176, HL, per Lord Macnaghten; *Greenwood v Bennett*[1973] QB 195, [1972] 3 All ER 586, CA.

## UPDATE

### 1059 Silence or inactivity when duty to speak or act

NOTE 1--See also *Northstar Land Ltd v Brooks*[2006] EWCA Civ 756, [2006] All ER (D) 128 (Jun) (vendor not bound to inform purchaser that he was not willing to postpone completion).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(i) The Representation/C. REPRESENTATION MADE BY CONDUCT/(B) Silence/1060. Election by estoppel.

### 1060. Election by estoppel.

The effect of silence or inaction in binding a person has been considered in cases where there is a right of election between two courses<sup>1</sup>. Mere silence does not amount to an election, but it is the duty of someone who has to make an election not to delay so long as to lead some other person, whether the party against whom the election is to be made or another, to alter his position in the belief that the first named has elected to let things remain as they are; and by so doing he will be precluded from making a different election<sup>2</sup>.

In this connection reference may be made to marine insurance cases. On receiving notice of abandonment, underwriters may elect whether to accept or reject it. In this case their mere silence is not an acceptance, but they may so conduct themselves as to be precluded from denying that they have accepted<sup>3</sup>.

A person who gives credit to an agent whom he knows to have a principal behind him is entitled to rely on the principal's credit even if he does not know the principal's name, and, on discovering who the principal is, may elect whether to look to him or to the agent; but, if by his conduct he has led the principal to believe that he looked to the agent alone for payment, and has thereby induced him either to pay the agent or to leave money in his hands, he is precluded from afterwards suing the principal<sup>4</sup>. Similarly, where a person who has been awarded damages for breach of contract for the sale of land accepts the damages, he cannot subsequently claim specific performance of the contract<sup>5</sup>.

<sup>1</sup> Where a claimant can put forward alternative inconsistent claims, he may be made to elect between them, and, having finally elected and abandoned one claim, he will be precluded from raising it thereafter. This principle is distinct from the estoppel discussed here, and is mentioned in PARA 962 ante.

<sup>2</sup> *Clough v London and North Western Ry Co* (1871) LR 7 Exch 26 at 35 (applied in *Morrison v Universal Marine Insurance Co* (1873) LR 8 Exch 197 at 204); *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221; *Aaron's Reefs v Twiss* [1896] AC 273 at 290, 294, HL; and see *Re Wheal Unity Wood Mining Co, Chynoweth's Case* (1880) 15 ChD 13, CA (company estopped by delay and acting on fraudulent transfer from refusing to recognise it); *Brailey v Rhodesia Consolidated Ltd* [1910] 2 Ch 95 (defective notice of dissent from reconstruction scheme); *Forman & Co Pty v The Liddesdale* [1900] AC 190, PC; *Civil Service Musical Instrument Association v Whiteman* (1899) 68 LJ Ch 484; *Young v Bristol Aeroplane Co Ltd* [1946] AC 163, [1946] 1 All ER 98, HL; see also *St Michael Uranium Mines Ltd v Rayrock Mines Ltd* (1957) 11 DLR (2d) 400.

<sup>3</sup> Marine Insurance Act 1906 s 62(5); *Provincial Insurance Co of Canada v Leduc* (1874) LR 6 PC 224 at 237; *Hudson v Harrison* (1821) 3 Brod & Bing 97; and see INSURANCE.

<sup>4</sup> *Macfarlane v Giannacopulo* (1858) 3 H & N 860; *Irvine & Co v Watson & Sons* (1880) 5 QBD 102 at 105 per Bowen J; affd 5 QBD 414, CA; following *Heald v Kenworthy* (1855) 10 Exch 739 at 746; and commenting on the dicta in *Thomson v Davenport*, *Fynney v Pontigny*, *Davenport v Thomson* (1829) 9 B & C 78; *Wyatt v Marquis of Hertford* (1802) 3 East 147. Where the creditor contracted with the agent in ignorance that he had a principal, so that he gave him exclusive credit in the first instance, the principal is relieved of liability without the intervention of any misleading conduct on the creditor's part if, before recourse is had to him, he has settled in account with his agent: *Armstrong v Stokes* (1872) LR 7 QB 598, as explained by Bowen J in *Irvine & Co v Watson & Sons* supra, an authority which, however, seems to be still open to review: *Irvine & Co v Watson & Sons* supra at 417, 421. See AGENCY vol 1 (2008) PARAS 131-132.

<sup>5</sup> *Meng Leong Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] AC 511, [1985] 1 All ER 120, PC.

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## (C) NEGLIGENCE

### 1061. Duty to use due care.

Before a person can be estopped by a representation inferred from negligent conduct<sup>1</sup>, there must be a duty to use due care towards the party misled, or towards the general public of which he is a member<sup>2</sup>. A person who does not lock up his goods, which are consequently stolen, may be said to be negligent as regards himself, but, in as much as he neglects no duty which the law casts upon him, he is not in consequence estopped from denying the title of those who may have purchased those goods from the thief<sup>3</sup>.

Persons who issue documents with a certain mercantile meaning attached to them, for example, delivery orders, owe a duty to merchants and others likely to deal with those documents to use due care in their issue<sup>4</sup>; and a railway undertaker or warehouseman issuing duplicate orders for the same goods may be estopped from denying that he had two parcels, to the prejudice of someone who has advanced money on the faith of the duplicate<sup>5</sup>. Accordingly, if in the course of business a person volunteers a statement upon which another businessman may probably act, it is his duty to take reasonable care that the statement is correct<sup>6</sup>.

<sup>1</sup> The expression 'estoppel by negligence' has been criticised as an inaccurate expression, in that estoppel arises from a representation by words or conduct (see *Saunders (Executrix of the Estate of Gallie) v Anglia Building Society*[1971] AC 1004 at 1038, [1970] 3 All ER 961 at 982, HL, per Lord Pearson; and see the case also sub nom *Gallie v Lee*[1969] 2 Ch 17 at 48, [1969] 1 All ER 1062 at 1081, CA, per Salmon LJ) and also on the ground that the expression is only one aspect of estoppel by conduct (see *Moorgate Mercantile Co Ltd v Twitchings*[1976] QB 225 at 239, [1975] 3 All ER 314 at 321, CA, per Lord Denning MR; revsd on another point [1977] AC 890, [1976] 2 All ER 641, HL).

<sup>2</sup> This does not mean that the onus is on the person misled to prove that the party he seeks to show is estopped owed a duty to him in the same way as is necessary in establishing the tort of negligence: see *Saunders (Executrix of the Estate of Gallie) v Anglia Building Society*[1971] AC 1004 at 1038, [1970] 3 All ER 961 at 982, HL, per Lord Pearson, overruling *Carlisle and Cumberland Banking Co v Bragg*[1911] 1 KB 489, CA.

<sup>3</sup> *Swan v North British Australasian Co* (1863) 2 H & C 175 at 181, Ex Ch per Blackburn J, quoting Parke B in *Freeman v Cooke*(1848) 2 Exch 654 at 657, and approved in *Arnold v Cheque Bank*, *Arnold v City Bank* (1876) 1 CPD 578 at 587; *Johnson v Crédit Lyonnais Co*, *Johnson v Blumenthal* (1877) 3 CPD 32 at 42, CA; *Bell v Marsh*[1903] 1 Ch 528 at 541, CA; and see *Morison v London County and Westminster Bank Ltd* (1913) 108 LT 379 at 381 (revsd [1914] 3 KB 356, CA); *London Joint Stock Bank v Macmillan and Arthur*[1918] AC 777 at 836, HL; *Mercantile Bank of India v Central Bank of India Ltd*[1938] AC 287, [1938] 1 All ER 52, PC; *Jerome v Bentley & Co*[1952] 2 All ER 114; *Central Newbury Car Auctions Ltd v Unity Finance Ltd*[1957] 1 QB 371, [1956] 3 All ER 905, CA (delivery of a car and registration book by the owner to a person held not to be a representation that that person owned or had authority to sell the car so as to estop the owner by reason of his negligence in parting with them from asserting his ownership); *Campbell Discount Co Ltd v Gall*[1961] 1 QB 431, [1961] 2 All ER 104, CA (hirer owed no duty to hire purchase company so as to estop him from denying liability on a hire purchase agreement signed in blank by the hirer into which the dealer inserted the wrong amount); *Mercantile Credit Co Ltd v Hamblin*[1965] 2 QB 242, [1964] 3 All ER 592, CA (car owner not negligent in signing hire purchase documents in blank in the belief that they were part of a mortgage transaction with a view to raising a loan on her car when she had no reason to suppose that anyone would be deceived by them); *Worcester Works Finance Ltd v Medens Ltd* (1973) 117 Sol Jo 143, CA (hire purchase company held not to be estopped from recovering a car from a third party by the fact that instead of repossessing the car it had negotiated a cash settlement with the person guilty of its conversion who had then sold the car to a third party); *Debs v Sibec Developments Ltd* [1990] RTR 91 (owner of stolen car delayed reporting theft to police because of threats from robbers; not estopped from recovering car from third party).

Much of the difficulty in applying the law of estoppel by negligence has arisen from a too literal acceptance of the broad principle laid down by Ashurst J in *Lickbarrow v Mason* (1787) 2 Term Rep 63 at 70; on appeal (1793)



4 Bro Parl Cas 57, HL: 'that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such person to occasion the loss must sustain it'. That case turned not upon estoppel but upon the negotiable elements of bills of lading, by reason of which the property they represented, though not any contract, was transferable by indorsement, but the decision might be supported on the ground of estoppel (indeed, Ashurst J, though he does not use the expression, treats the bill of lading as being 'negotiable by estoppel' just as the scrip was, according to the second ground of the decision, negotiable in *Goodwin v Roberts*(1876) 1 App Cas 476, HL), the bill of lading having been issued by the shipper with the intention that it should be acted on by a purchaser from the consignee, and it having been acted on by him in the manner intended by the shipper. Having regard to the facts before the court, and to the rest of his judgment, the principle was stated by Ashurst J with sufficient accuracy for the purposes of that case, and it has been properly applied in many cases. There have, however, been occasions when a too literal acceptance of its terms has led to error, and the necessity for some qualification has been frequently recognised. Lord Halsbury in *Farquharson Bros & Co v King & Co*[1902] AC 325 at 332, HL, and *Henderson & Co v Williams*[1895] 1 QB 521 at 529, CA, evidently preferred the expression of Savage CJ in *Root v French* (1835) 13 Wendell 570 at 572: 'When one of two innocent persons must suffer from the fraud of a third, he shall suffer who, *by his indiscretion*, has enabled such person to commit the fraud'. The words in italics add an important qualification to the proposition laid down by Ashurst J, but it is apparent, having regard to the principles stated in the text and the numerous authorities referred to in the notes, that even in that form the statement is not universally true. Probably the various conditions necessary to establish a case of estoppel by statement or by conduct cannot be more succinctly stated, having regard to the necessity of combining elasticity with precision, than in the judgment of Parke B in *Freeman v Cooke*(1848) 2 Exch 654, and Blackburn J in *Swan v North British Australasian Co* (1863) 2 H & C 175, Ex Ch. See also *Mercantile Bank of India Ltd v Central Bank of India Ltd*[1938] AC 287, [1938] 1 All ER 52, PC.

4 A vehicle registration document is not a document of title and does not prove legal ownership (*Central Newbury Car Auctions Ltd v Unity Finance Ltd*[1957] 1 QB 371 at 390, [1956] 3 All ER 905 at 915-916, CA, per Hodson LJ and at 397-398 and at 920-921 per Morris LJ) but is good evidence of it (see eg *Bentworth Finance Ltd v Lubert*[1968] 1 QB 680, [1967] 2 All ER 810, CA). See further CIVIL PROCEDURE vol 11 (2009) PARA 928.

5 *Coventry v Great Eastern Rly Co*(1883) 11 QBD 776, CA.

6 *Seton v Lafone*(1887) 19 QBD 68, CA (defendant warehousemen erroneously stated that goods which in fact had been parted with lay at their warehouse, and were liable to be sold for charges; the plaintiff thereupon bought the warrant for the goods, and the defendants were estopped from averring that they had not got them when they made the statement).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(i) The Representation/C. REPRESENTATION MADE BY CONDUCT/(C) Negligence/1062. No duty of special precaution against dishonesty.

### **1062. No duty of special precaution against dishonesty.**

A body corporate which permits its secretary to have the custody of its seal is not guilty of such negligence as will estop it against persons who have acted on unauthorised transfers executed by him under that seal from denying that they are forgeries, for it owes no duty to such persons in that regard<sup>1</sup>.

The acceptor of a bill of exchange owes no duty to subsequent holders to take precautions to prevent the amount from being fraudulently increased<sup>2</sup>; but, having regard to the contractual relation between them, there may be a duty owing by a customer to his bank, so that, if the customer, by any act of his<sup>3</sup> or by neglect of some act usual in the course of dealing between them, induces the bank to act on a forged document, he may be prevented from setting up his own act or neglect to the prejudice of the bank<sup>4</sup>. In the case of cheques, it has been held that a customer owes to his bank a duty to exercise reasonable care in drawing cheques which he issues to a payee or bearer so as not to mislead the bank or to facilitate forgery; and, if the customer, in drawing a cheque, neglects reasonable precautions against forgery and forgery ensues, he is liable to the bank for the loss<sup>5</sup>. However, there is no wider duty to take reasonable precautions in the management of his business with the bank to prevent forged cheques being presented for payment nor to check his bank statements and a customer is not estopped from asserting that cheques drawn on its account are forgeries by its failure to challenge the debits shown on its bank statements<sup>6</sup>.

1 *Bank of Ireland v Evans' Charities Trustees* (1855) 5 HL Cas 389 (explaining, at 411, 414, *Coles v Bank of England* (1839) 10 Ad & El 437, as a case of ratification); followed in *Mayor, Constables and Co of Merchants of Staple of England v Governor & Co of Bank of England* (1887) 21 QBD 160, CA; cf *Arnold v Cheque Bank, Arnold v City Bank* (1876) 1 CPD 578 (alleged negligence in custody of draft, and in not sending separate letter of advice); *Bechuanaland Exploration Co v London Trading Bank* [1898] 2 QB 658 (negotiable instrument stolen by secretary who kept key); *Patent Safety Gun Cotton Co v Wilson* (1880) 49 LJQB 713, CA (no duty to the public not to employ a clerk who has been guilty of dishonesty or, while doing so, to lock up cheques); *Lewes Sanitary Steam Laundry Co Ltd v Barclay & Co Ltd* (1906) 95 LT 444; *Kepitigalla Rubber Estates Ltd v National Bank of India Ltd* [1909] 2 KB 1010 (alleged negligence in custody of rubber stamp, the property of one director, and in not checking pass-book); *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777 at 800, HL.

2 *Scholfield v Earl of Londesborough* [1896] AC 514, HL. See also FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1559.

3 Eg by advising forged bills as coming forward for payment: *Bank of England v Vagliano Bros* [1891] AC 107, HL.

4 *Scholfield v Earl of Londesborough* [1896] AC 514 at 523-524, HL, per Lord Halsbury LC and at 537 per Lord Watson; *Greenwood v Martins Bank Ltd* [1933] AC 51, HL; and see *Bank of England v Vagliano Bros* [1891] AC 107 at 123-124, HL per Lord Selborne; *Wood v Clydesdale Bank Ltd* 1914 SC 397 (customer in writing instructed his bank to hand over to his brother a sum of money on deposit, and sent his brother a letter in similar terms with the indorsed deposit receipt, which was stolen in the post; it was held that, as the customer had not been negligent, he was entitled to recover from the bank the money which the bank had paid to someone who was not the customer's brother). A trustee is under no duty vis-à-vis a bank to act as watch-dog over his co-trustee: see *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650 at 656; *Welch v Bank of England* [1955] Ch 508 at 537, [1955] 1 All ER 811 at 824; but see the text and note 6 infra.

5 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 791 et seq, 1559.

6 *Tai Hing Cotton Mill Ltd v Liu Chong Hing Bank Ltd* [1986] AC 80, [1985] 2 All ER 947, PC; and see *Patel v Standard Chartered Bank* [2001] All ER (D) 2001 (April) (customer does not owe to a bank an implied contractual duty to report fraud of which the customer does not know, but which a putative reasonable person,

possessing the same information as the customer, would have discovered; claimants not estopped by breach of such putative duty on the part of the first claimant from denying that payments were made with their authority).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(i) The Representation/C. REPRESENTATION MADE BY CONDUCT/(C) Negligence/1063. Negligence in the transaction; proximate cause of misleading.

### **1063. Negligence in the transaction; proximate cause of misleading.**

In addition to the duty to use due care<sup>1</sup>, a second essential condition of estoppel by negligence is that the negligence must be in the transaction itself, and a third, which is so closely connected with the second that it is impossible to treat them separately, is that the negligence must not only be calculated to have the misleading effect attributed to it but must be the proximate or real cause of that result<sup>2</sup>.

On this principle<sup>3</sup> a bank having certified, as drawn against sufficient assets, a cheque with blank spaces in it which enabled the drawer afterwards to increase the amount for which it was drawn, was not estopped from denying to a holder in good faith that it was certified only for the original sum<sup>4</sup>. The appointment by a company of a secretary known to have once committed forgery, who, being entrusted with the company's books, takes advantage of his position to forge a cheque on the company's bank, is not sufficiently in the transaction, nor is it the proximate cause of the bank's parting with its money, as to give rise to an estoppel<sup>5</sup>.

<sup>1</sup> See PARA 1061 ante.

<sup>2</sup> *Bank of Ireland v Evans' Charities Trustees* (1855) 5 HL Cas 389 at 410 per Parke B, in delivering the judges' opinions; *Swan v North British Australasian Co* (1862) 7 H & N 603 at 633 (proposition of Wilde B, as qualified by Blackburn J, on appeal (1863) 2 H & C 175 at 182, Ex Ch); *Carr v London and North Western Ry Co* (1875) LR 10 CP 307 at 318; *Kepitigalla Rubber Estates Ltd v National Bank of India Ltd* [1909] 2 KB 1010 at 1025; *London Joint Stock Bank v Macmillan and Arthur* [1918] AC 777 at 800, 837, HL; *Greenwood v Martins Bank Ltd* [1933] AC 51, HL; *Welch v Bank of England* [1955] Ch 508 at 535, [1955] 1 All ER 811 at 823. The expression 'proximate cause' used in the fourth proposition in that case was explained in *Seton v Lafone* (1887) 19 QBD 68 at 71, CA, per Brett MR, with the approval of the other members of the Court of Appeal, to mean 'real cause'. It does not bear the same meaning as the words bear in the context of the tort of negligence: see *Saunders (Executrix of the Estate of Gallie) v Anglia Building Society* [1971] AC 1004 at 1038, [1970] 3 All ER 961 at 982, HL, per Lord Pearson. See also PARA 1061 note 2 ante and the cases cited in the notes to paras 1061-1062 ante; *Swan v North British Australasian Co* supra (as to the effect of which see PARA 1050 ante), following *Bank of Ireland v Evans' Charities Trustees* supra and *Taylor v Great Indian Peninsula Ry Co* (1859) 4 De G & J 559 (transfer signed with blanks is not, when filled up, the transferor's deed, and he is not estopped from saying so against persons who take it with any of the blanks remaining, for they must be taken to know of the invalidity), disapproving on appeal ((1863) 2 H & C 175 at 182) *Coles v Bank of England* (1839) 10 Ad & El 437; and followed in *Hall v West End Advance Co Ltd* (1883) Cab & El 161 (mortgagee of life policy handed it to mortgagor for verbal alterations, and forgot to get it back again); *Longman v Bath Electric Tramways Ltd* [1905] 1 Ch 646, CA (company permitting transferor of shares to obtain possession of certificates, whereby he was enabled to make a second and fraudulent transfer of them).

<sup>3</sup> *Ie* as well as on the grounds mentioned in PARA 1045 ante.

<sup>4</sup> *Imperial Bank of Canada v Bank of Hamilton* [1903] AC 49, PC, following *Scholfield v Earl of Londesborough* [1896] AC 514, HL; and see *Kepitigalla Rubber Estates Ltd v National Bank of India Ltd* [1909] 2 KB 1010.

<sup>5</sup> *Lewes Sanitary Steam Laundry Co Ltd v Barclay & Co Ltd* (1906) 95 LT 444, citing from Lord Halsbury's judgment in *Bank of England v Vagliano Bros* [1891] AC 107 at 115, HL ('the carelessness of the customer, or his neglect to take precautions, unconnected with the act itself, cannot be put forward by the banker as justifying his own default').

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(i) The Representation/C. REPRESENTATION MADE BY CONDUCT/(C) Negligence/1064. Neglect in preparation or custody of negotiable instruments.

#### **1064. Neglect in preparation or custody of negotiable instruments.**

The principles of estoppel by negligence have been frequently applied in cases where there has been want of care or of precaution, which in the result turned out to have been necessary, in the custody of negotiable instruments. The conduct of a person who leaves a cheque signed in blank in an unlocked drawer from which it is stolen by a thief who fills it up<sup>1</sup>, or who, when preparing a draft for post, omits to forward a separate letter of advice which would enable the intended recipient of the draft to stop payment in the event of its being abstracted and an indorsement being forged<sup>2</sup>, or who hands a cheque with a blank after the payee's name to an agent who adds words in the blank space which alter the effect of the cheque<sup>3</sup>, is not the proximate cause of the loss which ensues, and does not estop him from setting up the facts. Thus, giving a blank note for safe custody pending instructions, and with no present authority to issue it, to an agent who issues it without having received such instructions does not render the maker liable by estoppel<sup>4</sup>. A person whose signature is, by fraudulent statements that he is signing for some different purpose, obtained to a document which is in fact a promissory note, so that he has no idea of actually or potentially binding himself by contract, is not estopped as against a holder in due course, either by the Bills of Exchange Acts or at common law, from proving the true circumstances<sup>5</sup>.

Different considerations apply where the document relied on as a negotiable instrument has been completed<sup>6</sup> by the defendant or handed to an agent with authority to fill it up and issue it. In these cases an estoppel arises most usually from the authority which may be presumed to have been given<sup>7</sup>. It may, however, arise from negligence. A person who pays what is due on a negotiable instrument, not apparently overdue, owes a duty to the public to obtain it from the holder or to see that it is cancelled, and, if after payment he leaves it in the holder's hands, he will be estopped, as against a subsequent holder in good faith for value, from showing that it has been paid<sup>8</sup>.

1 *Baxendale v Bennett* (1878) 3 QBD 525, CA; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1503. It seems that it would be otherwise if the instrument had been completed before it was stolen: see *Ingham v Primrose* (1859) 7 CBNS 82 at 85.

2 *Arnold v Cheque Bank, Arnold v City Bank* (1876) 1 CPD 578.

3 *Slingsby v District Bank Ltd* [1932] 1 KB 544, CA. As to what are material alterations see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1560.

4 *Smith v Prosser* [1907] 2 KB 735, CA. Where there is authority to issue for any amount, the estoppel arises: *Lloyds Bank Ltd v Cooke* [1907] 1 KB 794, CA; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 1576.

5 *Lewis v Clay* (1897) 67 LJQB 224 (defendant informed that he was witnessing something which he was not allowed to see), following *Foster v Mackinnon* (1869) LR 4 CP 704; and cf para 1021 ante.

6 Bills of Exchange Act 1882 s 21(2); *Ingham v Primrose* (1859) 7 CBNS 82 at 85. The decision in this case was, however, dissented from by Brett LJ in *Baxendale v Bennett* (1878) 3 QBD 525, CA.

7 See FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARAS 1576-1577.

8 *Nash v De Freville* [1900] 2 QB 72, CA. 'Estoppel is the foundation of the rights arising upon the unauthorised transfer of negotiable instruments' (see *Nash v De Freville* supra at 89 per Collins LJ, citing *Russell v Langstaff* (1780) 2 Doug KB 514; *Schultz v Astley* (1836) 2 Bing NC 544); *Ingham v Primrose* (1859) 7 CBNS 82

(acceptor, on bill being returned to him after issue, having torn it in two, intending to cancel it, but in such manner that it might have been done for safe transmission by post held liable to a holder in good faith). It was otherwise where the bill was torn in four pieces: *Scholey v Ramsbottom* (1810) 2 Camp 485. This was not the view, however, of the Court of Exchequer in *Marston v Allen* (1841) 8 M & W 494 at 504.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(i) The Representation/D. ESTOPPEL BY CONVENTION/1065. Estoppel by convention.

## **D. ESTOPPEL BY CONVENTION**

### **1065. Estoppel by convention.**

Where two parties act, or negotiate, or operate a contract, each to the knowledge of the other on the basis of a particular belief, assumption or agreement (for example about a state of fact or of law, or about the interpretation of a contract), they are bound by that belief, assumption or agreement<sup>1</sup>. This is known as 'estoppel by convention', the common assumption or agreement between the parties (the 'convention') constituting the representation. There can be no estoppel by convention where, although both parties are labouring under a common mistaken apprehension, it cannot be said that they have acted on the basis of that apprehension<sup>2</sup>. Nor can the doctrine be invoked to deny a party the protection of a statute from the terms of which contracting out is not possible<sup>3</sup>. In order for an estoppel by convention to arise, the relevant assumption or agreement must be communicated by one party to the other, either by words or conduct<sup>4</sup>.

Estoppel by convention is not confined to an agreed assumption as to fact, but may be as to law; and the court will give effect to the agreed assumption only if it would be unconscionable not to do so. Once a common assumption is revealed to be erroneous, the estoppel will not apply to future dealings<sup>5</sup>. It has been held that where the parties reach a settlement in respect of a claim, and there is an underlying assumption that it will not be an abuse for the claimant to pursue further proceedings, the defendant will be estopped from seeking to strike out any such claim<sup>6</sup>. For relief to be granted it must be shown with sufficient certainty that the parties, in the circumstances of the case, had an obligation to act in a particular way, and an estoppel by convention cannot create a cause of action<sup>7</sup> but may be invoked as the basis for declaratory relief<sup>8</sup>.

<sup>1</sup> *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84 at 121, [1981] 3 All ER 577 at 584, CA per Lord Denning MR.

'... Lord Denning MR was alone in expressing the proposition as broadly as this': *Keen v Holland* [1984] 1 All ER 75 at 81, [1984] 1 WLR 251 at 260, CA per Oliver LJ. For the formulations of Eveleigh LJ and Brandon LJ see *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* supra at 126 and at 587, and at 131 and at 591 respectively. See also *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641; *Norwegian American Cruises A/S v Paul Mundy Ltd, The Vistafjord* [1988] 2 Lloyd's Rep 343, CA; *Waltons Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513, HC of A; *Dodd v Stansted Airport* (1998) 76 P & CR 456, [1998] RVR 107, Lands Tribunal; *Re Millwall Football Club and Athletic Co (1985) plc (in administration)* [1998] 2 BCLC 272; *Aker Oil and Gas Technology UK plc v Sovereign Corporate Ltd* [2002] All ER (D) 66 (Jan); *MSC Mediterranean Shipping Co SA v Owners of the Ship Tycho, Polish Ocean Lines Joint Stock Co v MSC Mediterranean Shipping Co SA* [2001] EWCA Civ 1198, [2001] 2 Lloyd's Rep 403, [2001] All ER (D) 321 (Jul) (evidence of parties' conduct sufficient to establish novation of contract or, alternatively, estoppel by convention); *Valentine v Allen* [2003] EWCA Civ 915, [2003] All ER (D) 79 (Jul) (claimant, and the defendants' predecessors in title, embarked on the development of their respective properties on the basis of a common assumption about layout of development scheme site and rights of access; claimant had been party to those arrangements and was estopped from denying them and from asserting rights inconsistent with the scheme). Cf *Gloyne v Richardson* [2001] EWCA Civ 716, [2001] 2 BCLC 669, [2001] All ER (D) 239 (May) (parties had established by their construction of the agreement a conventional basis, and had regulated their subsequent dealings on that basis; but no estoppel by convention on the facts); *Tesco Stores Ltd v Costain Construction Ltd* [2003] EWHC 1487 (TCC), [2003] All ER (D) 394 (Jul) (if, for whatever reason, the correct conclusion was that the parties had not made a binding contract, and such a finding was a pre-requisite for any issue of estoppel by convention to arise, then it was logically impossible to see how there could none the less be agreement between the parties sufficient to give rise to an estoppel by convention that they had made a contract which actually they had not made).

2 *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt* [1985] 2 Lloyd's Rep 28, CA. Cf the decisions in *Pacol Ltd v Trade Lines Ltd and R/I Sif IV, The Henrik Sif* [1982] 1 Lloyd's Rep 456 and *Government of Swaziland Central Transport Administration and Alfko Aussenhandels GmbH v Leila Maritime Co Ltd and Mediterranean Shipping Co SA, The Leila* [1985] 2 Lloyd's Rep 172 on this point; see also *Mostcash plc v Fluor (No 2)* [2002] EWCA Civ 975, 83 ConLR 1, [2002] All ER (D) 171 (Jul).

3 *Keen v Holland* [1984] 1 All ER 75, [1984] 1 WLR 251, CA; *Topham v Charles Topham Group Ltd* [2002] EWHC 1096 (Ch), [2003] 1 BCLC 123, [2002] All ER (D) 476 (May) (cited in note 7 infra); and see PARA 960 ante.

4 *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt* [1985] 2 Lloyd's Rep 28 at 34, CA, per Kerr LJ; *Norwegian American Cruises A/S v Paul Mundy Ltd, The Vistafjord* [1988] 2 Lloyd's Rep 343 at 351, CA, per Bingham LJ; *The Indian Endurance (No 2)*, *Republic of India v India Steamship Co Ltd* [1998] AC 878 at 913, [1994] 4 All ER 380 at 391, HL, per Lord Steyn, cited in *Glencore Grain Ltd v Flacker Shipping Ltd, The Happy Day* [2002] EWCA Civ 1068 at [80], [2002] 2 All ER (Comm) 896, [2002] 2 Lloyd's Rep 487 per Potter LJ; and see *Hillingdon London Borough Council v ARC Ltd* [2000] 3 EGLR 97, [2000] All ER (D) 820, CA (no estoppel by convention because 'shared' assumption not communicated).

5 *Hiscox v Outhwaite* [1992] 1 AC 562 at 577, [1991] 3 All ER 124 at 135, CA, per Lord Donaldson of Lynton MR; affd on other grounds [1991] 3 All ER 641, [1991] 3 All ER 641, HL.

6 *Johnson v Gore Wood and Co (a firm)* [2002] 2 AC 1, [2001] 1 All ER 481, HL. As to striking out see generally CIVIL PROCEDURE vol 11 (2009) PARA 520 et seq.

7 *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737; *Tesco Stores Ltd v Costain Construction Ltd* [2003] EWHC 1487 (TCC), [2003] All ER (D) 394 (Jul); and see *Topham v Charles Topham Group Ltd* [2002] EWHC 1096 (Ch), [2003] 1 BCLC 123, [2002] All ER (D) 476 (May) (doctrine of estoppel by convention could not be invoked to bring about an allotment of preference shares when there was no obligation to do so; to permit an estoppel when in fact no steps had been taken validly to allot any such preference shares by way of bonus issue would be to ride roughshod over the statutory requirements for the allotment of shares as fully paid).

8 See eg *John v George* (1995) 71 P & CR 375, [1996] 1 EGLR 7, CA.

## UPDATE

### 1065 Estoppel by convention

NOTE 1--See also *Revenue and Customs Comrs v Benchdollar Ltd* [2009] EWHC 1310 (Ch), [2010] 1 All ER 174.



Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(i) The Representation/E. REQUIREMENT OF MATERIALITY/1066. Representation must be material.

## **E. REQUIREMENT OF MATERIALITY**

### **1066. Representation must be material.**

'Materiality' of the representation has been judicially identified as one of the requirements of the modern law of estoppel by representation<sup>1</sup>. A representation is material if, for example, it is of such a nature that it would induce a person to enter into a contract, or tend to induce him to do so<sup>2</sup>; or if it is such that a person would naturally be induced to believe it<sup>3</sup>. This is an objective test but in practice a representation may be regarded as material if the representee did in fact act upon it<sup>4</sup>. Where the representation consists of negligent conduct, the negligence must not only be calculated to have the misleading effect attributed to it but must be the proximate or real cause of that result<sup>5</sup>.

The quality of the relevant assurances is an important element in proprietary estoppel<sup>6</sup>.

1 See *First National Bank plc v Thompson* [1996] Ch 231 at 236, [1996] 1 All ER 140 at 144-145, CA, per Millett LJ.

2 *Smith v Chadwick* (1882) 20 ChD 27 at 44; affd (1884) 9 App Cas 187, HL.

3 *Pickard v Sears* (1836) 6 Ad & El 469 at 473 per Denman CJ; and see *Freeman v Cooke* (1848) 2 Exch 654 at 664; see also eg *HDS Viscaya AS v Bryggen Shipping and Trading AS* [2002] EWHC 1678 (Comm), [2002] All ER (D) 31 (Aug) (advice given by defendant's operations manager did not amount to a representation that the tanks on board the vessel could have been sufficiently and properly cleaned for the carriage of methanol by the method suggested; nor would a reasonable person have regarded the operations manager's advice as having been intended for reliance upon by the master).

4 See eg *Museprime Properties Ltd v Adhill Properties Ltd* [1990] 2 EGLR 196 at 201 per Scott J ('a representation is material, in my opinion, if it is something that induces the person to whom it is made, whether solely or in conjunction with other inducements, to contract on the terms on which he does contract'); cf *Ellis v Lambeth London Borough Council* (1999) 32 HLR 596, [1999] All ER (D) 768, CA (no evidence that local council believed that no-one was occupying the relevant property). See also *London and Regional Investments Ltd v TBI plc* [2002] EWCA Civ 355, [2002] All ER (D) 360 (Mar) (joint venture negotiations subject to contract; no prospect of establishing estoppel affecting relevant two areas of land); *James v Evans* [2000] 3 EGLR 1, [2000] All ER (D) 1014, CA (defendant submitting that claimant, the deceased's executor, estopped from claiming possession of hill farm on basis of proprietary estoppel coming into existence as a result of negotiations between himself and deceased which had led to his taking over responsibility for the flock of sheep; held that requirement to take over and care for flock had been made known to the defendant before he entered into negotiations for the tenancy and was an ordinary incident of granting of tenancy of a hill farm; defendant always aware that entire negotiation carried on 'subject to contract'; no proprietary estoppel); *Keelwalk Properties Ltd v Waller, Keelwalk Properties Ltd v Griffith* [2002] EWCA Civ 1076, [2002] All ER (D) 467 (Jul) (mere fact that it might have been reasonable for a tenant to incur capital expenditure on the basis that the likelihood was that the landlord's practice of renewing tenancies would continue into the future could not be sufficient to convert that longstanding practice into a representation or assurance sufficient to found a proprietary estoppel).

5 See PARA 1063 ante.

6 See PARA 1090 post.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(i) The Representation/F. AMBIGUITY/1067. Representation must be unambiguous.

## **F. AMBIGUITY**

### **1067. Representation must be unambiguous.**

To found an estoppel a representation must be clear and unambiguous; not necessarily susceptible of only one interpretation, but such as will reasonably be understood by the person to whom it is made in the sense contended for, and for this purpose the whole of the representation must be looked at<sup>1</sup>. This is merely an application of the old maxim applicable to all estoppels, that they 'must be certain to every intent'<sup>2</sup>. A statement, true as far as it goes, is not to be taken to mean more than it says. Thus, in the absence of a duty to give full information, a statement that there are certain incumbrances on a fund is not to be construed as a representation that there are no others<sup>3</sup>. The mere parting with possession does not estop the owner of a chattel<sup>4</sup> or of a title deed from setting up his title against a purchaser for value<sup>5</sup>. This is so even where the possession was parted with for the fraudulent purpose of defeating creditors, provided it is not necessary for the owner to prove the fraudulent transaction as part of his title<sup>6</sup>.

Where, however, the representation is made in a statement, an estoppel may arise despite the fact that not every detail is certain<sup>7</sup>. Further, it has been suggested that the question of ambiguity does not arise when the nature of the estoppel is that of estoppel by convention, since the terms of the convention must be interpreted by the court<sup>8</sup>.

Where the representation takes the form of conduct, a plea of estoppel will fail if the conduct is ambiguous<sup>9</sup>.

1 *Low v Bouverie*[1891] 3 Ch 82, CA (see especially at 106 per Bowen LJ), following *Freeman v Cooke*(1848) 2 Exch 654 (conflicting statements), approved in *George Whitechurch Ltd v Cavanagh*[1902] AC 117 at 145, HL; *Re Lewis, v Lewis*[1904] 2 Ch 656, CA; *Onward Building Society v Smithson*[1893] 1 Ch 1, CA (representation contained in a deed); *Canada and Dominion Sugar Co Ltd v Canadian National (West Indies) Steamships Ltd*[1947] AC 46, PC (representation in bill of lading); *Marquess of Bute v Barclays Bank Ltd*[1955] 1 QB 202 at 213, [1954] 3 All ER 365 at 369; *Lowe v Lombank Ltd*[1960] 1 All ER 611 at 616, [1960] 1 WLR 196 at 205, CA (acknowledgment that goods are in good order and condition following a statement that the acknowledgment has examined the goods is no warranty by representation that the goods are free from latent defects); *UGS Finance v National Mortgage Bank of Greece* [1962] CLY 1148; affd [1964] 1 Lloyd's Rep 446, CA (intention shown by bank not to honour bonds which by the terms of their issue had to be presented within six years was not conduct leading the bond holders to believe that the bank would waive the time limit or the need for presentation of the bonds); *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd*[1972] AC 741 at 755-756, [1972] 2 All ER 271 at 280-281, HL, per Lord Hailsham of St Marylebone LC, at 768 and at 291 per Lord Cross of Chelsea, and at 771-772 and at 293-294 per Lord Salmon. A representation is not ambiguous for this purpose where it is susceptible of two interpretations one of which is that the person who made the representation has done something which at law he cannot do: *Spiro v Lintern*[1973] 3 All ER 319, [1973] 1 WLR 1002, CA.

Where the representation consists of a promise it must be clear and unequivocal: see eg *Seechurn v Ace Insurance Sa-Nv (formerly Cigna Insurance Co of Europe Sa-Nv)* [2002] EWCA Civ 67, [2002] 2 Lloyd's Rep 390, [2002] All ER (D) 74 (Feb) (nothing in the correspondence amounting to a clear unequivocal promise or representation, or common assumption, that the defendant would forgo its right to rely on the Limitation Act 1980; to say that the door was open to further negotiations did not carry any implication that a limitation defence would not be taken; claimant's failure to establish the requirement for such a representation fatal to any estoppel operating against the defendant); *Tameside Metropolitan Borough Council v Barlow Securities Group Services Ltd* [2001] EWCA Civ 1, 75 ConLR 112, [2001] All ER (D) 40 (Jan) (no clear and unequivocal representation by the claimant that it would forego its legal right to rely on the fact that the defendant did not have a final certificate in relation to the relevant contract; no promissory estoppel); *Italmare Shipping Co v Ocean Tanker Co Inc (No 2), The Rio Sun (No 2)* [1982] 3 All ER 273, [1982] 1 Lloyd's Rep 404 (no clear and

unequivocal representation, either expressed or implied, that owners need not give notice under anti-technicality clause before withdrawing the vessel; no promissory estoppel).

2 Co Litt 352b; and see PARA 1014 ante.

3 *Low v Bouverie*[1891] 3 Ch 82, CA; cf *M'Kenzie v British Linen Co*(1881) 6 App Cas 82, HL; *Scarfe v Hallifax* (1840) 7 M & W 288 (sheriff's return that he had levied of the plaintiff's goods £67 did not affirm that £30 further, paid for charges, was the plaintiff's money).

4 *Weiner v Gill, Weiner v Smith*[1905] 2 KB 172 at 183; affd [1906] 2 KB 574, CA (applying *Farquharson Bros & Co v King & Co*[1902] AC 325, HL); *Meggy v Imperial Discount Co*(1878) 3 QBD 711, CA; *Price v Groom*(1848) 2 Exch 542; and see *Kingsford v Merry* (1856) 1 H & N 503, Ex Ch, considered in *Henderson & Co v Williams*[1895] 1 QB 521, CA; *Johnson v Crédit Lyonnais Co, Johnson v Blumenthal* (1877) 3 CPD 32, CA; *Hollins v Fowler*(1875) LR 7 HL 757 at 764; *Truman v Attenborough* (1910) 103 LT 218; *Central Newbury Car Auctions Ltd v Unity Finance Ltd*[1957] 1 QB 371, [1956] 3 All ER 905, CA (plaintiffs not estopped by the delivery of a car and its registration book to a person from denying his apparent authority to sell the car).

5 *Brocklesby v Temperance Permanent Building Society*[1895] AC 173 at 180, HL, per Lord Herschell LC, following *Martinez v Cooper* (1826) 2 Russ 198; and see *Lloyds Bank Ltd v Bullock*[1896] 2 Ch 192; *Colonial Bank v Cady and Williams, London Chartered Bank of Australia v Cady and Williams*(1890) 15 App Cas 267, HL.

6 *Bowes v Foster* (1858) 2 H & N 779; followed in *Taylor v Bowers*(1876) 1 QBD 291 at 298, CA.

7 See eg *Holiday Inns Inc v Broadhead* (1974) 232 Estates Gazette 951 at 1087 per Goff J (relief can be granted although the arrangement or understanding between the parties is not sufficiently certain to be enforceable as a contract); *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113, 64 P & CR 233, PC (written agreement between the parties whereby claimant was to give up his share in house and land and accept in exchange land to be allotted to the defendant by the government; agreement void for uncertainty as impossible to identify land to be given in exchange; claimant estopped from denying the defendant's title to the whole of the land provided that defendant paid him monetary compensation).

8 See *Troop v Gibson*[1986] 1 EGLR 1 at 3, CA, per Arnold P.

9 See eg *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep 57 at 67-68; *Crédit Suisse v Beegas Nominees Ltd*[1994] 4 All ER 803 at 832, 69 P & CR 177 at 218 per Lindsay J ('nowhere is the meaning and effect of the principal covenant discussed or assumed. Nowhere at any time relevant to estoppel is the ordinary consequence of the landlord's liability under the principal covenant, namely the tenant's liability under the service charge, discussed or assumed'); *Baird Textiles Holdings Ltd v Marks & Spencer plc* [2001] EWCA Civ 274, [2002] 1 All ER (Comm) 737 (parties' obligations not sufficiently certain to find estoppel by conduct).

## UPDATE

### 1067 Representation must be unambiguous

NOTE 1--See also *Babar v Anis*[2005] EWHC 1384 (Ch), [2005] 3 FCR 216.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(ii) The Nature of Reliance/1068. Elements of reliance.

## **(ii) The Nature of Reliance**

### **1068. Elements of reliance.**

It has been said that there cannot be any estoppel by representation unless the alleged representor has said or done something with the result that his action or inaction has produced some belief or expectation in the mind of the alleged representee<sup>1</sup>. Thus the representation must influence the mind of the person to whom it is addressed<sup>2</sup>.

Equally, there is no estoppel by representation unless the representee's conduct is in some way influenced by the representation, although that conduct need not derive its origin only from the encouragement or representation of the first party<sup>3</sup>.

<sup>1</sup> See *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt* [1985] 2 Lloyd's Rep 28 at 35, CA, per Kerr LJ.

<sup>2</sup> See PARA 1071 post. The representation must be communicated (see PARA 1052 the text and note 11 ante) and must be intended to be acted upon (see PARA 1069 post).

<sup>3</sup> See *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84 at 104-105, [1981] 1 All ER 923 at 936 per Robert Goff J; affd [1982] QB 84, [1981] 3 All ER 577, CA.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(ii) The Nature of Reliance/1069. Intention that representation should be acted upon.

### **1069. Intention that representation should be acted upon.**

It is not necessary that the representation should be false to the knowledge of the party making it<sup>1</sup>, provided that:

- 16 (1) it is intended to be acted upon in the manner in which it was acted upon<sup>2</sup>; or
- 17 (2) the person who makes it so conducts himself that a reasonable person would take the representation to be true, and believe that it was meant that he should act upon it in that manner<sup>3</sup>.

It has been additionally stated that the doctrine of estoppel by representation ought not in most cases to be applied unless the representation is such that, if consideration were present, it could amount to a contractual promise by the party making it<sup>4</sup>. An unfounded assumption may form the basis of estoppel where, although neither party believed it to be true, both have knowingly acted upon a conventional hypothesis. Where two parties agree that a commercial instrument is to be taken as founded on a certain fact, and the position of one by that agreement is altered, the other ought not to be allowed to deny it<sup>5</sup>.

1 In the early cases, however, this appears to have been the law: *Gale v Lindo* (1687) 1 Vern 475; *Montefiori v Montefiori* (1762) 1 Wm Bl 363; *Neville v Wilkinson* (1782) 1 Bro CC 543; cited in *Jorden v Money* (1854) 5 HL Cas 185 at 212.

2 The language of Brett J in *Carr v London and North Western Ry Co* (1875) LR 10 CP 307 imports that, where the representation is false to the knowledge of the party making it, it is not necessary that he should intend it to be acted upon. This language is consistent with that used by Parke B in *Freeman v Cooke* (1848) 2 Exch 654, who does not, however, lay down the rule in terms. The point is not, perhaps, important, since, where a deliberately false statement is acted upon, there is usually little difficulty in inferring the intention that it should be, and, where the intention is made out, and the intended result follows, the person who made the representation is not permitted to question that it contributed to the result: *Smith v Kay* (1859) 7 HL Cas 750 at 759, 770; followed in *Gordon v Street* [1899] 2 QB 641 at 646, CA. A person must be taken to intend what a reasonable person would understand him to intend: *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd* [1956] 1 QB 529 at 540, 541, [1956] 1 All ER 536 at 539, CA. In the absence of fraud a mere puffing exaggeration of value by a vendor in negotiating a sale is not a representation which he is afterwards estopped from denying: *Martin v Douglas* (1867) 16 WR 268.

3 *Freeman v Cooke* (1848) 2 Exch 654 at 663 (explaining the rule in *Pickard v Sears* (1837) 6 Ad & El 469 at 474), approved in *Jorden v Money* (1854) 5 HL Cas 185 at 214; *Howard v Hudson* (1853) 2 E & B 1; *Swan v North British Australasian Co* (1863) 2 H & C 175 at 181, 188, Ex Ch, per Cockburn CJ; *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352 at 360; *M'Kenzie v British Linen Co* (1881) 6 App Cas 82, HL; *Sarat Chunder Dey v Gopal Chunder Lala* (1892) 56 JP 741, PC; and see *Cornish v Abington* (1859) 4 H & N 549; *Carr v London and North Western Ry Co* (1875) LR 10 CP 307 at 316-317; *Seton v Lafone* (1887) 19 QBD 68, CA; *Re Henry Bentley & Co and Yorkshire Breweries Ltd, ex p Harrison* (1893) 69 LT 204, CA; *Pierson v Altrincham Urban Council* (1917) 86 LJB 969; *Re Wickham* (1917) 34 TLR 158; *MacLaine v Gatty* [1921] 1 AC 376, HL; *Re National Benefit Assurance Co Ltd* [1932] 2 Ch 184 at 189; *Greenwood v Martins Bank Ltd* [1933] AC 51 at 57, HL; *Farrow v Orttewell* [1933] Ch 480 at 498-499, CA; *Square v Square (otherwise Bewicke)* [1935] P 120; *Lowe v Lombank Ltd* [1960] 1 All ER 611 at 617, [1960] 1 WLR 196 at 206, CA; and see the cases cited in PARA 1082 note 6 post. See also *Pierce v Promco SA* [1999] ITCLR 233 (estoppel claim failed because there was no evidence that the arrangements between the parties were intended to have legal effect).

4 *Freeman v Cooke* (1848) 2 Exch 654 at 664, approved in *Clarke and Chapman v Hart* (1858) 6 HL Cas 633 at 656; applied in *Palmer v Moore* [1900] AC 293 at 298, PC.

5 *Ashpitel v Bryan* (1863) 3 B & S 474 at 492 per Crompton J; affd (1864) 5 B & S 723, Ex Ch (bill drawn and indorsed by arrangement between the parties in the name of a dead person); cf *Glenie v Smith* [1907] 2 KB

507; affd on somewhat different grounds [1908] 1 KB 263, CA; and see the judgment in *M'Cance v London and North Western Ry Co* (1864) 3 H & C 343 at 345, Ex Ch.

## **UPDATE**

### **1069 Intention that representation should be acted upon**

NOTE 3--See *Beagle Equities Ltd v Tatanaki* [2008] All ER (D) 42 (Sep) (claim failed because highly improbable that document would have been made on basis of oral assurance alone).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(ii) The Nature of Reliance/1070. Representation induced by party complaining.

**1070. Representation induced by party complaining.**

A representation will be deprived of any effect as an estoppel if the making of it has been contributed to by some breach of duty on the part of the person seeking to take advantage of it<sup>1</sup>. This principle is not confined to cases of wilful misrepresentation by those persons. No representation can be relied on as an estoppel if induced by the concealment of any material fact on the part of the person who wishes to use it as such; and, if the person to whom it is made knows something calculated to influence the other to hesitate to seek further information, and has withheld that knowledge, the representation ought not to be treated as an estoppel<sup>2</sup>. The same principle has been applied where there has been perfectly innocent conduct amounting to a misrepresentation<sup>3</sup>, inviting the conduct relied on as an estoppel; but, whether in this case it rests upon the doctrine of 'estoppel against estoppel'<sup>4</sup>, or upon that of 'implied warranty' or contract to indemnify, appears to be open to question<sup>5</sup>. In cases of promissory or proprietary estoppel, which are equitable doctrines, unconscionable conduct on the part of the person pleading the estoppel will deprive him of relief<sup>6</sup>.

1 *Customs and Excise Comrs v Hebdon Ltd* [1953] 2 Lloyd's Rep 382 at 396-397; cf *Larner v LCC* [1949] 2 KB 683, [1949] 1 All ER 964, CA. See also *Abraham v Metropolitan Police Comr* [2001] 1 WLR 1257, [2000] All ER (D) 2201, CA (claimant's admission in formal caution, based on facts grossly exaggerated by police, had no effect as an estoppel to prevent her from pursuing her claim for false imprisonment).

2 *George Whitechurch Ltd v Cavanagh* [1902] AC 117 at 145, HL, per Lord Brampton; approved and followed in *Porter v Moore* [1904] 2 Ch 367 (trustee lulled into security before making erroneous statement that trust fund was unincumbered); and in *Doey v London and North Western Ry Co* [1919] 1 KB 623, DC.

3 This was one of the grounds of decision in *Simm v Anglo-American Telegraph Co, Anglo-American Telegraph Co v Spurling* (1879) 5 QBD 188, CA, as explained in *Balkis Consolidated Co v Tomkinson* [1893] AC 396 at 406, HL, by Lord Herschell LC; see also at 411 per Lord Macnaghten, approved by Lord Davey in *Ruben v Great Fingall Consolidated* [1906] AC 439 at 446, HL.

4 See *Dixon v Kennaway & Co* [1900] 1 Ch 833 at 840 per Farwell J.

5 See *Ruben v Great Fingall Consolidated* [1906] AC 439 at 446, HL, per Lord Davey, citing *Sheffield Corpn v Barclay* [1905] AC 392, HL.

6 See eg *Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ 873, [2003] All ER (D) 332 (Jun); and PARAS 1086, 1091 post.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(ii) The Nature of Reliance/1071. Representation must influence the mind of the person to whom it is addressed.

**1071. Representation must influence the mind of the person to whom it is addressed.**

The representation must either produce a belief or expectation in the mind of the representee<sup>1</sup> or confirm or strengthen a belief which he already holds<sup>2</sup>. Thus, where an overpayment was made by an employer, and the employer subsequently reassured the employee to whom the payment was made that there was no mistake, the employer was estopped from later reclaiming the overpayment<sup>3</sup>; but where a bank credited money to the defendant's bank in error, but the defendant was not misled into thinking that he was entitled to the money, the bank was not estopped from reclaiming the money<sup>4</sup>.

Where the person to whom the representation is made already holds a belief and the representation has no effect on that belief at all, then there is no estoppel<sup>5</sup>.

1 See eg *K Lokumal & Sons (London) Ltd v Lotte Shipping Co Pte Ltd, The August Leonhardt* [1985] 2 Lloyd's Rep 28 at 35, CA, per Kerr LJ.

2 See *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84 at 104-105, [1981] 1 All ER 923 at 936 per Robert Goff J ('there may be cases where the representee has proceeded initially on the basis of a belief derived from some other source independent of the representor, but his belief has subsequently been confirmed by the encouragement or representation of the representor'); affd [1982] QB 84, [1981] 3 All ER 577, CA; and see eg *The Stolt Loyalty* [1993] 2 Lloyd's Rep 281, affd [1995] 1 Lloyd's Rep 598, CA (defendant's silence encouraged an expectation in the claimant's solicitor's mind that she need take no further action in order to preserve time).

3 See *Avon County Council v Howlett* [1983] 1 All ER 1073, [1983] 1 WLR 605, CA.

4 See eg *United Overseas Bank Ltd v Jiwani* [1977] 1 All ER 733, [1976] 1 WLR 964.

5 See *Fontana NV v Mautner* [1980] 1 EGLR 68, 254 Estates Gazette 199 (on a change of landlords the tenant was warned that he would have to give up possession; when his domestic situation was explained to the new landlord's representative the tenant was told that he could stay as long as he wished, but later was given notice to quit; held that the tenant had believed all along that he was entitled to stay and that the representation made to him had had no effect on that belief and was not relied on by him in any way); *Guestheath Ltd v Mirza* (1990) 22 HLR 399, [1990] 2 EGLR 111, CA (landlords had consistently maintained approach that tenancy was protected; tenant not influenced by landlords' representation in any way as completely satisfied at all times about his status); cf *Wayling v Jones* (1993) 69 P & CR 170 at 173-175, [1996] 2 FCR 41 at 45-47, CA (claimant relied on partner's promise that property would be left to him in partner's will; stated in evidence that that promise was not the reason why he lived with his partner but that if, after the promise had been made, he had found out that it was not going to be kept he would have left; held that his conduct was such that it could be inferred that he relied on the promise).



Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(ii) The Nature of Reliance/1072. Representation must have been acted upon by party to whom it was made.

**1072. Representation must have been acted upon by party to whom it was made.**

The representation must have been acted upon in some way<sup>1</sup> by the party to whom it was made<sup>2</sup>, including a member of a class of persons<sup>3</sup>, for example the customers of a particular firm. It is not enough that a person to whom an untrue representation was made acted upon it as true after he had notice that it was not<sup>4</sup>. A representation made to one person and acted upon by him cannot be taken advantage of by another to whom it was not made and who has not acted upon it<sup>5</sup>. It is not sufficient that the party complaining acted in a manner consistent with the truth of the representation if it appears that he was not influenced by it<sup>6</sup>. If, however, he really has relied upon its truth, it is no answer to say that, if he had thought about it, he must have known that it was untrue; the representation itself was what put him off his guard<sup>7</sup>. If the representation is clear and unequivocal, or at least one which could reasonably be understood to be clear and unequivocal, he is under no obligation to make investigation or inquiry to ascertain whether it is true<sup>8</sup>.

A representation does not, by reason of having been acted upon, become irrevocable; there is nothing to prevent the party who made it from withdrawing it and requiring the other, for the future, to act as if it had not been made<sup>9</sup>.

A representation must have been acted upon in the manner in which it was meant to be acted upon, or in such manner as a reasonable person would suppose it was meant to be acted upon<sup>10</sup>. A railway undertaking's advice note to a consignee is not intended to be acted upon by his selling the goods<sup>11</sup>, but the undertaking must be supposed to know that delivery orders in the usual form are documents with a mercantile meaning attached to them, and may have credit given to them as documents of title<sup>12</sup>. Similarly, those who issue bills of lading must be supposed to contemplate that purchasers of the goods described in them will act upon the statements they find there<sup>13</sup>.

Acting upon a representation may be described as a change of position, and may include inaction where some action would otherwise have been taken, as the representation may lead the person to whom it is made to rest satisfied<sup>14</sup>.

1 See *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84 at 104-105, [1981] 1 All ER 923 at 936 per Robert Goff J; affd [1982] QB 84, [1981] 3 All ER 577, CA.

2 *Freeman v Cooke* (1848) 2 Exch 654; *Howard v Hudson* (1853) 2 E & B 1; *Edmundson v Thompson and Blakey* (1861) 31 LJ Ex 207; *MacLaine v Gatty* [1921] 1 AC 376 at 386, HL; *Re National Benefit Assurance Co Ltd* [1932] 2 Ch 184 at 189; *Greenwood v Martins Bank Ltd* [1933] AC 51 at 57, HL; *Square v Square (otherwise Bewicke)* [1935] P 120; cf *Vandepitte v Preferred Accident Insurance Corp of New York* [1933] AC 70, PC. As between immediate parties an ordinary receipt does not estop the person who gave it from showing that the money was not paid (*Skaife v Jackson* (1824) 3 B & C 421; *Graves v Key* (1832) 3 B & Ad 313; *Bowes v Foster* (1858) 2 H & N 779), although it might do so as against a third party who had acted in reliance upon it (*Oliver v Nautilus Steamship Co* [1903] 2 KB 639 at 648, CA, per Vaughan Williams LJ; *Ellen v Great Northern Ry Co* (1901) 17 TLR 453, CA (receipt evidence of accord and satisfaction); *Huckle v LCC* (1910) 27 TLR 112, CA); and see CIVIL PROCEDURE vol 11 (2009) PARA 953; CONTRACT vol 9(1) (Reissue) PARA 947). The cases of agents charging themselves in account should, however, be distinguished: see PARA 1057 ante. Cf *Moss v London and North Western Ry Co* (1874) 22 WR 532 (payment to a contractor of money which is due on completion does not estop the person who made the payment from denying that the work was complete); *Lowe v Lombank Ltd* [1960] 1 All ER 611 at 617, [1960] 1 WLR 196 at 206, CA, per Diplock J (the hirer's signature on a car delivery receipt containing a statement as to the car's condition was not a representation which induced the hire-purchase company to enter into a hire-purchase agreement, and did not estop the hirer from relying upon an implied condition of fitness). As to the effect of receipt clauses in deeds see PARA 1025 ante.

- 3 See *Swan v North British Australasian Co* (1863) 2 H & C 175 at 182, Ex Ch, per Blackburn J; *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330 (statements in company prospectus).
- 4 *Dunston v Paterson* (1857) 2 CBNS 495.
- 5 *Heane v Rogers* (1829) 9 B & C 577 at 586; *R v Ambergate etc Rly Co* (1853) 1 E & B 372; *Miles v McIlwraith* (1883) 8 App Cas 120 at 134, PC, approving *Freeman v Cooke* (1848) 2 Exch 654; *Farquharson Bros & Co v King & Co* [1902] AC 325 at 341, HL; *Burgis v Constantine* [1908] 2 KB 484 at 499-500, CA; *MacFisheries Ltd v Harrison* (1924) 93 LJB 811.
- 6 See PARA 1071 ante; and see eg *Lebeau v General Steam Navigation Co* (1872) LR 8 CP 88 (representation as to contents of case not relied upon by master, who signed bills of lading 'contents unknown'); *Re African Gold Concessions and Development Co, Markham and Darter's Case* [1899] 1 Ch 414 at 430 (affd without discussing this point [1899] 2 Ch 480, CA); *Cropper v Smith* (1884) 26 ChD 700, CA (affd, without discussion, sub nom *Smith v Cropper* (1885) 10 App Cas 249, HL (statement as to novelty in petition for letters patent)); and see *Russo-Chinese Bank v Li Yau Sam* [1910] AC 174, PC; *Mordaunt Bros v British Oil and Cake Mills Ltd* [1910] 2 KB 502. A person who takes up a bill of lading without objection may be assumed to have relied upon it: *Silver v Ocean Steamship Co Ltd* [1930] 1 KB 416, CA; but see *The Skarp* [1935] P 134. A person who has no knowledge of a company's articles of association cannot be said to rely upon them, even though he has constructive notice of their contents: *Rama Corp Ltd v Proved Tin and General Investments Ltd* [1952] 2 QB 147, [1952] 1 All ER 554.
- 7 *Bloomenthal v Ford* [1897] AC 156 at 168-170, HL, per Lord Herschell; cf *Lancashire and Yorkshire Rly Co, London and North Western Rly Co and Graeser Ltd v MacNicol* (1918) 88 LJB 601 (representation made by a railway company in an advice note not calculated to mislead the consignee, who must necessarily see the goods before he acted upon the advice note).
- 8 *Bloomenthal v Ford* [1897] AC 156 at 168, HL, per Lord Herschell; *Marquess of Bute v Barclays Bank Ltd* [1955] 1 QB 202 at 213, [1954] 3 All ER 365 at 369 per McNair J. Cf *Official Trustee of Charity Land v Ferriman Trust Ltd* [1937] 3 All ER 85 at 89-90 (a payment of rent by someone other than the tenant held not to be conduct that a reasonable person would take as a representation by the payer that he had taken an assignment, but at most conduct to put the landlord on inquiry).
- 9 *White v Greenish* (1861) 11 CBNS 209 at 232.
- 10 *Freeman v Cooke* (1848) 2 Exch 654; *Gillman, Spencer & Co v Carbutt & Co* (1889) 61 LT 281 at 282-283, CA; cf *Lancashire and Yorkshire Rly Co, London and North Western Rly Co and Graeser Ltd v MacNicol* (1918) 88 LJB 601.
- 11 *Carr v London and North Western Rly Co* (1875) LR 10 CP 307 at 317; cf *Farmeloe v Bain* (1876) 1 CPD 445; *Lancashire and Yorkshire Rly Co, London and North Western Rly Co and Graeser Ltd v MacNicol* (1918) 88 LJB 601.
- 12 *Coventry v Great Eastern Rly Co* (1883) 11 QBD 776, CA.
- 13 *Cia Naviera Vasconzada v Churchill and Sim, Cia Naviera Vasconzada v Burton & Co* [1906] 1 KB 237 at 247; *Howard v Tucker* (1831) 1 B & Ad 712.
- 14 See *Knights v Wiffen* (1870) LR 5 QB 660 at 665-666 per Blackburn J. Cf *Fontana NV v Mautner* [1980] 1 EGLR 68, 254 Estates Gazette 199, where the inaction was not influenced in any way by the representation.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(iii) The Nature of Detriment/1073. Reliance on representation must lead person to change his position to his detriment.

### (iii) The Nature of Detriment

#### **1073. Reliance on representation must lead person to change his position to his detriment.**

It is necessary to estoppel by representation that in acting upon the representation the party to whom it was made should have changed his position to his detriment<sup>1</sup>. A representation made to a person after he has changed his position cannot give rise to an estoppel, although, if made earlier, and acted upon, it might have done so<sup>2</sup>. It is a sufficient change of position if he is induced by the representation to take no step to protect himself or to retrieve his position until it is too late<sup>3</sup>. The mere payment of money under a mistake of fact induced by the representation in circumstances where there is not the slightest difficulty in recovering it is not such damage or prejudice as will give rise to an estoppel<sup>4</sup>; but the parting with money, and being out of it for a certain period of time, coupled with the trouble and possible expense of establishing the right to recover it, may amount to a change of position to the payer's prejudice within the rule<sup>5</sup>.

Detriment has been described as that which would flow from the change of position if the assumption were deserted that led to it<sup>6</sup>. In cases where the representation relied upon is a promise<sup>7</sup>, it seems that the vaguer the promise alleged, the clearer should be any evidence of detriment incurred in reliance on the promise if it is to give rise to an estoppel<sup>8</sup>.

Particular considerations regarding detriment arise in the context of promissory estoppel, which are considered below<sup>9</sup>. In the context of proprietary estoppel, it has been stated that detriment is not a narrow or technical concept, and that it need not consist of the expenditure of money or other quantifiable financial detriment, provided that it is something substantial<sup>10</sup>; it may thus consist of the undertaking of a difficult task, such as looking after the householder's disabled daughter<sup>11</sup>.

1 *Freeman v Cooke*(1848) 2 Exch 654 at 663; *Newton v Liddiard*(1848) 12 QB 925; *Bank of Hindustan, China and Japan Ltd v Alison*(1871) LR 6 CP 222 at 227; *Carr v London and North Western Rly Co*(1875) LR 10 CP 307 at 317-318; *Re Collie, ex p Adamson*(1878) 8 ChD 807 at 817, CA; *Simm v Anglo-American Telegraph Co, Anglo-American Telegraph Co v Spurling*(1879) 5 QBD 188 at 208, CA; *George Whitechurch Ltd v Cavanagh*[1902] AC 117 at 135, HL; *Bell v Marsh*[1903] 1 Ch 528 at 543, CA; *Imperial Bank of Canada v Bank of Hamilton*[1903] AC 49, PC; *Re Lewis, Lewis v Lewis*[1904] 2 Ch 656, CA; *Williams v Evans*[1911] P 175 at 178; *Crane v Wallasey Corpn* (1912) 107 LT 150; *Kershaw v Alfred John Smith & Co Ltd*[1913] 2 KB 455 at 464, DC; *Re Evans, ex p Salaman* [1916] HBR 111 at 113; *Re Wickham* (1917) 34 TLR 158; *Hartley v Hymans*[1920] 3 KB 475 at 495; *MacLaine v Gatty*[1921] 1 AC 376 at 386, HL; *Holt v Markham*[1923] 1 KB 504, CA; *Pigg v Tow Law Overseers (Weardale Union)* (1923) 22 LGR 17 at 23, 25; *Jones Bros (Holloway) Ltd v Woodhouse*[1923] 2 KB 117 at 125, 128, DC; *Re National Benefit Assurance Co*[1932] 2 Ch 184; *Greenwood v Martins Bank Ltd*[1933] AC 51 at 57, HL; *REL (otherwise R) v EL*[1949] P 211, [1949] 1 All ER 141; *Waiwai Ltd v Grey and Menzies Ltd* [1957] NZLR 70 (plaintiff had been permitted to market a bottle originally designed by the defendant on the basis of the plaintiff's statement that the plaintiff's intended modifications to the bottle's appearance would sufficiently distinguish the parties' products; he was estopped from later saying that the differentiation had proved insufficient so as to prevent the defendant using the original design); *Willesden Corpn v Gloss* (1962) 185 Estates Gazette 377; *Rother Valley Rly Co Ltd v British Railways Board* (1968) 19 P & CR 532, CA; *Norfolk County Council v Secretary of State for the Environment*[1973] 3 All ER 673, [1973] 1 WLR 1400, DC (local planning authority which mistakenly informed an applicant that planning permission had been granted not estopped from later denying the validity of the planning permission, as the applicant had not acted to its detriment relying on the misinformation); *Hammersmith and Fulham London Borough Council v Top Shop Centres Ltd, Hammersmith and Fulham London Borough Council v Glassgrove Ltd*[1990] Ch 237, [1989] 2 All ER 655 (undertenant entitled to rely on estoppel against head landlord following forfeiture of lease). See further PARA 1074 post.

2 *Horsfall v Halifax and Huddersfield Union Banking Co* (1883) 52 LJ Ch 599 (defendants, after the plaintiff had made advances on the shares of one of its shareholders, told the plaintiff that they had no charge on them); *M'Kenzie v British Linen Co* (1881) 6 App Cas 82 at 109, HL (supposed drawer of forged bill, on learning of the forgery after the bank had made advances, omitted to give prompt information); *Morrison v Universal Marine Insurance Co* (1873) LR 8 Exch 197 (underwriters, after loss of ship became known, delayed repudiation of policy); cf *Bell v Marsh* [1903] 1 Ch 528, CA.

3 *Knights v Wiffen* (1870) LR 5 QB 660 (discussed in *Simm v Anglo-American Telegraph Co*, *Anglo-American Telegraph Co v Spurling* (1879) 5 QBD 188 at 212, CA; and followed in *Dixon v Kennaway & Co* [1900] 1 Ch 833); *Rodenhurst Estates Ltd v W H Barnes Ltd* [1936] 2 All ER 3, CA; and see *Ogilvie v West Australian Mortgage and Agency Corp* [1896] AC 257, PC.

For other examples of detrimental reliance where an opportunity has been lost see *Pacol Ltd v Trade Lines Ltd and R/I Sif IV*, *The Henrik Sif* [1982] 1 Lloyd's Rep 456 (missing the chance to sue on time); *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839, [1968] 2 All ER 987 (missing a chance to put right a technical defect in a document); *Hammersmith and Fulham London Borough Council v Top Shop Centres Ltd*, *Hammersmith and Fulham London Borough Council v Glassgrove Ltd* [1990] Ch 237, [1989] 2 All ER 655 (missing the chance to negotiate for a new lease). Cf *Ellis v Lambeth London Borough Council* (1999) 32 HLR 596, [1999] All ER (D) 768, CA (alleged loss of the opportunity to levy community charge for two years not material in the circumstances of the case; no detrimental reliance).

4 *Carr v London and North Western Ry Co* (1875) LR 10 CP 307 at 317-318, as explained in *Cia Naviera Vasconzada v Churchill and Sim*, *Cia Naviera Vasconzada v Burton & Co* [1906] 1 KB 237 at 250 per Channell J.

5 *Cia Naviera Vasconzada v Churchill and Sim*, *Cia Naviera Vasconzada v Burton & Co* [1906] 1 KB 237 at 250.

6 See *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 674 per Dixon J.

7 In cases of promissory or proprietary estoppel: see PARA 1082 et seq post.

8 See *Jones v Watkins* (26 November 1987, unreported), CA, per Slade LJ.

9 See PARA 1085 post.

10 See *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, CA; and PARA 1091 post.

11 See *Greasley v Cooke* [1980] 3 All ER 710, [1980] 1 WLR 1306, CA.

## UPDATE

### **1073 Reliance on representation must lead person to change his position to his detriment**

NOTES--See *Hutchinson v Steria Ltd* [2006] EWCA Civ 1551, [2006] All ER (D) 349 (Nov).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(iii) The Nature of Detriment/1074. Change of position must be referable to representation.

**1074. Change of position must be referable to representation.**

It has been stated that the detriment, as well as the representation, must be material; thus where a person failed to register as occupier of a property for payment of the community charge<sup>1</sup> and later claimed adverse possession of the property as against the local authority which owned it, the alleged loss by the authority of the opportunity to levy community charge for two years was not material in the circumstances and did not give rise to an estoppel in its favour<sup>2</sup>. The change of position must be referable in some way to the representation; where it would have occurred in any event, there is no detrimental reliance<sup>3</sup>.

1 As to the replacement of the community charge by council tax with effect from 1 April 1993 see RATING AND COUNCIL TAX vol 39(1B) (Reissue) PARA 2.

2 *Ellis v Lambeth London Borough Council* (1999) 32 HLR 596, [1999] All ER (D) 768, CA. As to adverse possession of registered land see now the Land Registration Act 2002 Pt 9 (ss 96-98, Sch 6); *Land Registration for the Twenty-First Century, a Conveyancing Revolution* (Law Com no 271) (2001) PARA 14.6; and LAND REGISTRATION.

3 See eg *Costagliola v English* (1969) 210 Estates Gazette 1425 (claimant had not used vehicles on track across defendant's land for eleven years but claimed right of way; defendant alleged that she had modernised her house in reliance on there being no such right of way; held that her actions were not referable to any representation by the claimant and that all she had done was to improve a house which in any case was badly in need of improvement). See also the cases cited in PARA 1071 note 5 ante.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(1) GENERAL PRINCIPLES/(iii) The Nature of Detriment/1075. Burden of proof of detrimental reliance.

### **1075. Burden of proof of detrimental reliance.**

Once detriment has been proved, it seems that it is not for the person to whom the representation was made to establish causation but for the person who made the representation to establish that the other party's change of position was not as a result of reliance on the representation. Thus, in the absence of evidence to the contrary, such reliance may be presumed<sup>1</sup>.

<sup>1</sup> See *Greasley v Cooke* [1980] 3 All ER 710 at 713, [1980] 1 WLR 1306 at 1311, CA, per Denning LJ and at 714-715 and 1312-1313 per Waller LJ; followed in eg *Habib Bank Ltd v Habis Bank AG Zurich* [1981] 2 All ER 650 at 668, [1981] 1 WLR 1265 at 1287, CA, per Oliver LJ ('reliance can be inferred from the circumstances'); *Grant v Edwards* [1986] Ch 638 at 657, [1986] 2 All ER 426 at 439, CA, per Sir Nicholas Browne-Wilkinson V-C (where the issue was one of constructive trust rather than estoppel); *Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498; *Hammersmith and Fulham London Borough Council v Top Shop Centres Ltd, Hammersmith and Fulham London Borough Council v Glassgrove Ltd* [1990] Ch 237 at 262, [1989] 2 All ER 655 at 670 per Warner J; *Walton v Walton* (14 April 1994, unreported), CA, per Hoffmann LJ; *Wayling v Jones* (1993) 69 P & CR 170 at 173, [1996] 2 FCR 41 at 44, CA, per Balcombe LJ; *Gillett v Holt* [2001] Ch 210 at 228, [2000] 2 All ER 289 at 304, CA, per Robert Walker LJ.

As to the burden and standard of proof in civil proceedings see generally CIVIL PROCEDURE vol 11 (2009) PARAS 769-775.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(2) COMMON LAW ESTOPPEL BY REPRESENTATION/1076. Requirements for common law estoppel by representation.

## **(2) COMMON LAW ESTOPPEL BY REPRESENTATION**

### **1076. Requirements for common law estoppel by representation.**

Common law estoppel by representation arises where a person has by words or conduct<sup>1</sup> made to another a clear and unequivocal<sup>2</sup> representation of fact, either with knowledge of its falsehood or with the intention that it should be acted upon<sup>3</sup>, or has so conducted himself that another would, as a reasonable person, understand that a certain representation of fact was intended to be acted upon, and the other person has acted upon such representation and thereby altered his position<sup>4</sup>. In such circumstances an estoppel arises against the party who made the representation, and he is not allowed to aver that the fact is otherwise than he represented it to be<sup>5</sup>. It seems that, in contrast to the position where promissory estoppel<sup>6</sup> or proprietary estoppel<sup>7</sup> arises, there is no additional requirement of unconscionability<sup>8</sup>.

1 'Conduct' may include silence or inaction (see PARA 1059 ante) or negligence (see PARAS 1061-1064 ante). An estoppel may also arise by convention, ie where the parties have agreed between themselves to act on a common assumption, whether or not it is in fact true: see PARA 1065 ante.

2 As to ambiguity see PARA 1067 ante.

3 See PARA 1069 ante.

4 See *Carr v London and North Western Rly Co*(1875) LR 10 CP 307 at 316-317 per Brett J; cf *Greenwood v Martins Bank Ltd*[1933] AC 51 at 57, HL, per Lord Tomlin; and see PARA 957 ante. As to reliance and detriment see PARAS 1068-1075 ante.

5 See note 4 supra.

6 As to promissory estoppel see PARA 1082 et seq post.

7 As to proprietary estoppel see PARA 1089 et seq post.

8 See PARA 1080 post.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(2) COMMON LAW ESTOPPEL BY REPRESENTATION/1077. Representation must be of existing fact.

### **1077. Representation must be of existing fact.**

For the purposes of common law estoppel by representation, a representation must be of an existing fact<sup>1</sup>, not of a mere intention<sup>2</sup>, nor of a mere belief<sup>3</sup>. In the case of something future there is no occasion to apply the common law rule as to estoppel, because the party to whom the representation is made has only to say 'enter into a contract' and all difficulty is removed<sup>4</sup>. It is true that the state of a person's mind is a fact, and in that sense a person who makes a statement as to his present intention makes a statement of existing fact<sup>5</sup>; but estoppel is available, where there is a cause of action, to prevent a person from denying what he has once said, and is not a cause of action in itself<sup>6</sup>. It has been said that the person who made the statement of intention is to be put in the same position as if it were true, but in no worse a position<sup>7</sup>; and, had the statement of intention been true, the maker would have been at liberty to change his mind<sup>8</sup>. The representation of an existing state of things as being of a continuous nature is, however, more than a statement of intention, and a person who has made the representation cannot, after ridding himself of that state of things, take advantage of its removal to the prejudice of another who has acted on the representation<sup>9</sup>.

1 A person who fraudulently represented himself to be a trader was held to be estopped from denying that he was a trader for the purpose of escaping bankruptcy: *Re Leslie, ex p Leslie* (1856) 25 LJ Bcy 37. A person having only a partial interest in an estate, but contracting to sell as if he had the entire interest, was held to be estopped from denying as against the purchaser that he had the entire interest: *Mortlock v Buller* (1804) 10 Ves 292 at 315; and see *Merediths v Saunders* (1814) 2 Dow 514 at 518, HL, per Lord Eldon LC. A vendor, on contracting to sell land, represented that there were no rectorial tithes. Subsequently, having discovered that he was himself the lay impropriator, he sued that purchaser for those tithes, but was estopped by his representation from succeeding: *Mansel-Lewis v Lees* (1910) 102 LT 237. *R v South Eastern Rly Co* (1910) 74 JP 137, CA appears at first sight to conflict with the proposition in the text; the report, however, is brief, and the effect seems to be that a party to a written agreement may, by a representation as to the meaning of an ambiguous expression, estop himself from averring that it has another meaning.

2 *Jorden v Money* (1854) 5 HL Cas 185 (approved in *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352); *Maddison v Alderson* (1883) 8 App Cas 467 at 473, HL (overruling *Loffus v Maw* (1862) 3 Giff 592); *Chadwick v Manning* [1896] AC 231, PC; *George Whitechurch Ltd v Cavanagh* [1902] AC 117; *Coleman v North* (1898) 47 WR 57 at 58; *Cresswell v Jeffreys* (1912) 28 TLR 413, DC (revsd on other grounds 29 TLR 90 at 91, CA); *Yorkshire Insurance Co v Craine* [1922] 2 AC 541 at 553; PC; cf *Farmeloe v Bain* (1876) 1 CPD 445; *Re Fickus, Farina v Fickus* [1900] 1 Ch 331 at 335; *Veitch v Caldicott* (1945) 173 LT 30; *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334 at 342-343 [1957] 2 All ER 343 at 349 per McNair J (representation that plaintiff would not in future object to an advertising sign remaining in his air space created no estoppel).

3 *National Westminster Bank Ltd v Barclays Bank International Ltd* [1975] QB 654 at 674, [1974] 3 All ER 834 at 850 per Kerr J (bank which honours a cheque on which the customer's signature is undetectably forged does not represent that the signature is genuine so as to estop the bank from later claiming to recover the money from the payee). Although the tendering of payment under a contract may amount to a representation that the tenderer believes the sums are due, it does not amount to a representation of the parties' rights under the contract: *Philip Collins Ltd v Davis* [2000] 3 All ER 808, [2000] IP & T 1167.

4 *Citizens' Bank of Louisiana v First National Bank of New Orleans* (1873) LR 6 HL 352 at 361 per Lord Selborne LC, quoting *Jorden v Money* (1854) 5 HL Cas 185; but see *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 at 242, [1975] 3 All ER 314 at 323, CA, per Lord Denning MR; revsd on another point [1977] AC 890, [1976] 2 All ER 641, HL.

5 'The state of a man's mind is as much a fact as the state of his digestion': *Edgington v Fitzmaurice* (1885) 29 ChD 459 at 483, CA, per Bowen LJ.



6 *Low v Bouverie* [1891] 3 Ch 82 at 101, 105, CA per Lindley and Bowen LJ. Thus an innocent misrepresentation does not by estoppel become a cause of action (see *Dickson v Reuter's Telegram Co* (1877) 3 CPD 1, CA; *Brett v Clowser* (1880) 5 CPD 376), but it may become conclusive evidence of title in a claim for conversion (*Knights v Wiffen* (1870) LR 5 QB 660; *Wah Tat Bank Ltd and Oversea-Chinese Banking Corp Ltd v Chan Cheng Kum and Hua Siang Steamship Co Ltd* [1967] 2 Lloyd's Rep 437; on appeal sub nom *Kum v Wah Tat Bank Ltd* [1971] 1 Lloyd's Rep 439, PC), or of a contract (*Cornish v Abington* (1859) 4 H & N 549; *Thomas v Brown* (1876) 1 QBD 714 at 722). Cf the position regarding proprietary estoppel: see PARA 1089 post.

7 See *Bishop v Balkis Consolidated Co* (1890) 25 QBD 512 at 521, CA, per Lindley LJ; *Beattie v Lord Ebury* (1872) 7 Ch App 777 at 805; affd on other grounds (1874) LR 7 HL 102; *Canterbury Corp v Cooper* (1908) 99 LT 612 at 615 per Channell J; affd (1909) 100 LT 597, CA. It may happen, however, that his hearer is indirectly put in a better position: see *Ogilvie v West Australian Mortgage and Agency Corp* [1896] AC 257 at 270, PC, per Lord Watson; and see PARA 1081 post.

8 See *Veitch v Caldicott* (1945) 173 LT 30 at 33.

9 *Piggott v Stratton* (1859) 1 De GF & J 33 (the grantor of leasehold property stated truly that his own lease restrained him from obstructing the view; he afterwards surrendered his lease and took a new one without the restraint, but was held to his statement as being a representation of a continuous restraint); distinguished on this point in *M'Evoy v Drogheda Harbour Comrs* (1867) 16 WR 34 at 38.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(2) COMMON LAW ESTOPPEL BY REPRESENTATION/1078. Representation may include representation of law.

**1078. Representation may include representation of law.**

A representation may be a representation of fact even though it involves and includes that which is also matter of law<sup>1</sup>. Thus directors of a company, by drawing a bill in the company's name, may represent that there is a private Act of Parliament giving the company the requisite powers<sup>2</sup> or, by issuing debentures, that the company's powers are not exhausted<sup>3</sup>. While a true statement of facts, accompanied by an erroneous inference of law, will not estop the person who made it from afterwards denying the correctness of that inference<sup>4</sup>, it has been held that a representation as to the legal effect of a document will create an estoppel if there is no qualification in the representation suggesting that the document, and not its effect as represented, is to govern the relationship of the parties<sup>5</sup>. A person who has by a fraudulent statement of the legal effect of an instrument obtained some advantage will not be allowed to retain it<sup>6</sup>, although it would appear that a mere misrepresentation of a matter of legal inference from facts which are known to both parties is not a ground of estoppel<sup>7</sup>.

Where it is sought to determine a tenancy by a notice to quit<sup>8</sup>, a person who gives a bad notice to quit, namely a notice which does not operate as a defeasance of the tenant's estate, is not afterwards estopped from saying that it is void<sup>9</sup>; but, if the person to whom an invalid notice to quit has been given has acted upon the notice to his detriment, the person who gave the notice is estopped from denying its validity<sup>10</sup>. Conversely, if the recipient of an invalid notice to quit accepts it as terminating his contractual tenancy and holds over as a statutory tenant, he may be estopped from denying its validity<sup>11</sup>.

1 *Re the Local Government Superannuation Acts 1937 and 1939, Algar v Middlesex County Council* [1945] 2 All ER 243 at 251, DC; *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247 at 253, [1956] 1 WLR 29 at 40, CA, per Hodson LJ. Cf *Lyle-Meller v A Lewis & Co (Westminster) Ltd* supra at 250 and at 35 (where Denning LJ was of the opinion that a representation as to the true interpretation of a contract, even if regarded as a representation of law, would give rise to a promissory estoppel); and see *Moorgate Mercantile Co Ltd v Twitchings* [1976] QB 225 at 242, [1975] 3 All ER 314 at 323, CA, per Lord Denning MR; revsd on another point [1977] AC 890, [1976] 2 All ER 641, HL. In *Covell v Sweetland* [1968] 2 All ER 1016, [1968] 1 WLR 1466 a wife's failure to object to or disagree with her husband's letters written on the basis that his obligation to pay maintenance ended on her remarriage was held to constitute a representation of mixed law and fact by the wife that this was the true position. As to promissory estoppel see PARA 1082 et seq post.

2 *West London Commercial Bank v Kitson* (1884) 13 QBD 360, CA; cf *R v South Eastern Rly Co* (1910) 74 JP 137, CA (representation as to meaning of ambiguous expression). See also PARA 1077 note 1 ante.

3 *Rashdall v Ford* (1866) LR 2 Eq 750 at 754.

4 *Morgan v Couchman* (1853) 14 CB 100 (party who set out in an affidavit facts showing cross-dealings between himself and another, describing them as 'payment', not estopped from showing there was no payment).

5 *De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330 at 342 per Luxmoore J; *Sidney Bolsom Investment Trust Ltd v E Karmios & Co (London) Ltd* [1956] 1 QB 529 at 540, 541, [1956] 1 All ER 536 at 539, CA, per Denning LJ. See also *Shah v Shah* [2001] EWCA Civ 527, [2002] QB 35, [2001] 4 All ER 138, cited in PARA 1011 ante.

6 *Hirschfeld v London, Brighton and South Coast Rly Co* (1876) 2 QBD 1 at 4, 5; *Molloy v Mutual Reserve Life Insurance Co* (1906) 94 LT 756 at 760, CA.

7 *Beattie v Lord Ebury* (1872) 7 Ch App 777 at 802 (affd on other grounds (1874) LR 7 HL 102), approving *Rashdall v Ford* (1866) LR 2 Eq 750 at 754; *Cresswell v Jeffreys* (1912) 28 TLR 413, DC (on appeal 29 TLR 90 at 91, CA); *Re Hooley Hill Rubber and Chemical Co Ltd and Royal Insurance Co Ltd* [1920] 1 KB 257 (insurance

company held not to be precluded, by an erroneous opinion of its manager that a loss was covered by a fire insurance policy, from denying that the policy covered the loss which happened); *London County Territorial and Auxiliary Forces Association v Nichols* [1949] 1 KB 35, [1948] 2 All ER 432, CA (whether Rent Acts applied to premises); and see *Kai Nam v Ma Kam Chan* [1956] AC 358, [1956] 1 All ER 783, PC; cf *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247 at 251, [1956] 1 WLR 29 at 36, CA, per Denning LJ.

8 As to notice to quit see LANDLORD AND TENANT vol 27(1) (2006 Reissue) PARA 213 et seq.

9 *Re Bebington's Tenancy, Bebington v Wildman* [1921] 1 Ch 559 at 565.

10 *Farrow v Orttewell* [1933] Ch 480, CA, applying the doctrine of estoppel laid down in *Pickard v Sears* (1837) 6 Ad & El 469 at 474, and *Freeman v Cooke* (1848) 2 Exch 654 at 663; and see PARAS 957, 1073 ante.

11 See *Harman Singh v Jamal Pirbhai* [1951] AC 688 at 699-700, PC, cited by Denning LJ in *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247 at 251, [1956] 1 WLR 29 at 36, CA.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(2) COMMON LAW ESTOPPEL BY REPRESENTATION/1079. Requirement of detrimental reliance.

**1079. Requirement of detrimental reliance.**

In order for a common law estoppel by representation to arise, the person to whom the representation is made must have changed his position in some way to his detriment<sup>1</sup>. In doing so, he must have relied on the representation, although that need not have been the sole cause of his change of position<sup>2</sup>.

1 See PARA 1076 ante. As to the nature of detriment see PARAS 1073-1075 ante.

2 See PARA 1068 the text and note 3 ante.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(2) COMMON LAW ESTOPPEL BY REPRESENTATION/1080. Whether requirement of unconscionability applies.

**1080. Whether requirement of unconscionability applies.**

Unconscionability is an essential element in promissory estoppel<sup>1</sup> and proprietary estoppel<sup>2</sup>, which are equitable doctrines<sup>3</sup>. Because it is an equitable concept, it does not, strictly speaking, have any place in common law estoppel by representation; thus provided the requirements of representation and detrimental reliance are established, there is no need to prove that it would be unconscionable for the representor to go back on the representation. In practice, however, the categories are less clear-cut<sup>4</sup> and it has been said that it is unconscionability which provides the link between the many circumstances capable of giving rise to an estoppel<sup>5</sup>.

1 See PARA 1086 post.

2 See PARA 1091 post.

3 As to the development of reliance-based estoppel see PARA 956 ante.

4 See eg *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd*, *Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n at 151n, [1981] 1 All ER 897 at 915 per Oliver J.

5 See *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 at 41, [2001] 1 All ER 481 at 508, HL, per Lord Goff of Chieveley.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(2) COMMON LAW ESTOPPEL BY REPRESENTATION/1081. The effect of common law estoppel by representation.

### **1081. The effect of common law estoppel by representation.**

Common law estoppel by representation is not a cause of action<sup>1</sup> but may enable a claim to succeed or fail if a party is estopped from disputing a particular fact alleged<sup>2</sup>. When prejudice or damage is made out, the other circumstances being such as to create an estoppel, its consequences are not necessarily measured by the amount of prejudice or damage sustained. Thus, if a customer of a bank is estopped from asserting that a cheque with which he has been debited is a forgery, by his neglect to give such timely information as would have enabled the bank to have recourse to the forger, the debit will stand for the whole amount, and not for so much only as would have been recovered from the forger had the customer not allowed the bank to remain in ignorance of the facts<sup>3</sup>; but in cases of overpayment of money estoppel may operate to give relief *pro tanto*<sup>4</sup>. In a claim for conversion in which the claimant succeeds on an estoppel the claimant is entitled to the full value of the goods even if it is more than the actual damage sustained by the representation<sup>5</sup>; and a person who, in a claim against shipowners for delivery of goods in a damaged condition, succeeds by reason only that the shipowners are estopped from denying that the goods were shipped in good order and condition, can recover the whole of the damage which on delivery the goods were found to have suffered, without regard to the fact that he has a right, which he may still exercise, to recover the same damages from the shippers<sup>6</sup>.

It has been said that a defence of estoppel by representation may no longer be appropriate in restitutionary claims where the more flexible defence of change of position is available<sup>7</sup>.

1 See eg *Low v Bouverie* [1891] 3 Ch 82 at 105 per Bowen LJ; and see PARA 1077 note 6 ante.

2 See *Low v Bouverie* [1891] 3 Ch 82 at 112 per Kay LJ; and see eg *Xtralite (Rooflights) Ltd v Hartington Conway Ltd* [2003] EWHC 1872 (Ch) at [26], [2003] All ER (D) 555 (Jul) per Pumfrey J (common law estoppel by representation capable of binding true owner of patent so as to estop him from asserting title to the invention).

3 *Ogilvie v West Australian Mortgage and Agency Corp'n Ltd* [1896] AC 257 at 270, PC, cited in *Avon County Council v Howlett* [1983] 1 All ER 1073, [1983] 1 WLR 605, CA; cf *M'Kenzie v British Linen Co* (1881) 6 App Cas 82 at 100, HL; and see FINANCIAL SERVICES AND INSTITUTIONS vol 49 (2008) PARA 791 et seq.

4 *National Westminster Bank plc v Somer International UK Ltd* [2001] EWCA Civ 970, [2002] QB 1286, [2002] 1 All ER 198; *Scottish Equitable plc v Derby* [2000] 3 All ER 793, [2001] 2 All ER (Comm) 119 (affd [2001] EWCA Civ 369, [2001] 3 All ER 818 [2001] 2 All ER (Comm) 272); cf the cases cited in note 3 supra.

5 *Henderson & Co v Williams* [1895] 1 QB 521 at 535, CA.

6 *Cia Naviera Vasconzada v Churchill and Sim*, *Cia Naviera Vasconzada v Burton & Co* [1906] 1 KB 237 at 250-251, following *Henderson & Co v Williams* [1895] 1 QB 521, CA. As to the effect of bills of lading see PARA 1056 ante.

7 See *Philip Collins Ltd v Davis* [2000] 3 All ER 808 at 826, [2000] IP & T 1167 at 1186 per Jonathan Parker J. As to the defence of change of position see RESTITUTION vol 40(1) (2007 Reissue) PARA 166 et seq.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(3) PROMISSORY ESTOPPEL/1082. In general.

### (3) PROMISSORY ESTOPPEL

#### 1082. In general.

When one party has, by his words or conduct, made to the other a clear and unequivocal<sup>1</sup> promise or assurance which was intended to affect the legal relations between them<sup>2</sup> and to be acted on accordingly<sup>3</sup>, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself has so introduced<sup>4</sup>. This doctrine of promissory estoppel<sup>5</sup> derives from a principle of equity enunciated in 1877<sup>6</sup>, but has been the subject of considerable development<sup>7</sup>.

1 *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd*[1972] AC 741 at 768, [1972] 2 All ER 271 at 291, HL, per Lord Cross of Chelsea. See also *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade*[1983] 2 AC 694, [1983] 2 All ER 763, HL.

2 See *Braithwaite v Winwood*[1960] 3 All ER 642, [1960] 1 WLR 1257. There need not be a pre-existing contractual relationship between the parties provided there is a pre-existing legal relationship which could in certain circumstances give rise to penalties and liabilities: *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd*[1968] 2 QB 839 at 847, [1968] 2 All ER 987 at 991 per Donaldson J; and see *Robertson v Ministry of Pensions*[1949] 1 KB 227, [1948] 2 All ER 767; *Maharaj v Chand*[1986] AC 898, [1986] 3 All ER 107, PC; cf *McCathie v McCathie* [1971] NZLR 58, NZ CA. The principle also applies where the promise affects a legal relationship which will arise in the future: *Bank Negara Indonesia v Philip Hoalim* [1973] 2 MLJ 3, PC (landlord who assured his tenant that, if the tenant gave up premises in respect of which the tenant had statutory security of tenure and moved into other premises owned by the same landlord, the tenant would enjoy the same security of tenure, and that, so long as the tenant continued to practise his profession, the landlord would not ask him to leave the premises, estopped from later alleging that the tenant had no statutory security in the second premises so as to claim possession from the tenant before he had ceased to carry on his profession). See also *Evenden v Guildford City Association Football Club Ltd*[1975] QB 917 at 923-924, [1975] 3 All ER 269 at 273, CA, per Lord Denning MR and at 926 and at 275 per Browne LJ (employee transferred from a supporters club to a kindred football club on a representation that his employment would be regarded as continuous; football club estopped from contending to the contrary for the purposes of redundancy payments).

The doctrine has no application, eg, as between a trespasser and a landowner who has forborne to enforce his rights: see *Morris v Tarrant*[1971] 2 QB 143, [1971] 2 All ER 920; but see *Watson v Canada Permanent Trust Co* (1972) 27 DLR (3d) 735, BC (doctrine applied to an offer of an option, unsupported by consideration, but acted upon). As to rights of option see CONTRACT vol 9(1) (Reissue) PARA 640.

3 *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*[1971] AC 850 at 884, [1970] 2 All ER 871 at 895, HL, per Lord Diplock.

4 *Combe v Combe*[1951] 2 KB 215 at 220, [1951] 1 All ER 767 at 770, CA, per Denning LJ; *P v P*[1957] NZLR 854; *Beesly v Hallwood Estates Ltd*[1960] 2 All ER 314 at 324, [1960] 1 WLR 549 at 561 per Buckley J; affd on another point [1961] Ch 105, [1961] 1 All ER 90, CA; *John Burrows Ltd v Subsurface Surveys Ltd and Whitcomb* (1968) 68 DLR (2d) 354.

5 For a discussion of promissory estoppel, and of equitable estoppel generally, see *Waltons Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513, Aust HC.

6 *Hughes v Metropolitan Rly Co*(1877) 2 App Cas 439 at 448, HL, per Lord Cairns LC, interpreted in *Birmingham and District Land Co v London and North Western Rly Co*(1888) 40 ChD 268 at 286, CA, per Bowen LJ; and see *Combe v Combe*[1951] 2 KB 215 at 219, [1951] 1 All ER 767 at 769, CA, per Denning LJ. In its inception the equitable principle was that, if parties who had entered into definite legal relations afterwards entered 'upon a course of negotiations which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable, having

regard to the dealings which have thus taken place between the parties': *Hughes v Metropolitan Rly Co* supra at 448, HL. The following cases have been suggested as instances of the application of the principle: *Fenner v Blake*[1900] 1 QB 426, DC; *Bruner v Moore*[1904] 1 Ch 305; *Re Wickham* (1917) 34 TLR 158; *Re William Porter & Co Ltd*[1937] 2 All ER 361; *Marquess of Salisbury v Gilmore*[1942] 2 KB 38 at 51, [1942] 1 All ER 457 at 463, CA, per Mackinnon LJ; *Buttery v Pickard* [1946] 1 WN 25; *Rural Municipality of St James v Bailey and Driscoll* (1957) 7 DLR (2d) 179; *City and Westminster Properties (1934) Ltd v Mudd*[1959] Ch 129, [1958] 2 All ER 733 (although in this case the promisee did furnish consideration); *Ajayi v RT Briscoe (Nigeria) Ltd*[1964] 3 All ER 556 at 559, [1964] 1 WLR 1326 at 1330, PC. Cf *De Tchihatchef v Salerni Coupling Ltd*[1932] 1 Ch 330; *Farrow v Orttewell*[1933] Ch 480, CA.

7 *Central London Property Trust Ltd v High Trees House Ltd*[1947] KB 130 at 134, [1956] 1 All ER 256n at 258n per Denning J; *Robertson v Minister of Pensions*[1949] 1 KB 227, [1948] 2 All ER 767; *Combe v Combe*[1951] 2 KB 215, [1951] 1 All ER 767, CA. See also *Foot Clinics (1943) Ltd v Cooper's Gowns Ltd*[1947] KB 506; *Ledingham v Bermejo Estancia Co Ltd*[1947] 1 All ER 749; *Charles Rickards Ltd v Oppenheim*[1950] 1 KB 616 at 623, [1950] 1 All ER 420 at 423, CA, per Denning LJ; *Wallis v Semark* [1951] 2 TLR 222 at 226, CA, per Denning LJ; *Lyle-Meller v A Lewis & Co (Westminster) Ltd*[1956] 1 All ER 247, [1956] 1 WLR 29, CA, per Denning LJ; *P v P*[1957] NZLR 854; *D & C Builders Ltd v Rees*[1966] 2 QB 617, [1965] 3 All ER 837, CA; *Re Wyvern Developments Ltd*[1974] 2 All ER 535 at 542-543, [1974] 1 WLR 1097 at 1104-1105 per Templeman J; *Evenden v Guildford City Association Football Club Ltd*[1975] QB 917, [1975] 3 All ER 269, CA; and see *Augier v Secretary of State for the Environment* (1978) 38 P & CR 219; *Smith v Lawson* (1998) 75 P & CR 466, CA. See further PARA 1083 et seq post.



Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(3) PROMISSORY ESTOPPEL/1083. Representation is a promise not to enforce strict legal rights.

### **1083. Representation is a promise not to enforce strict legal rights.**

The representation<sup>1</sup> required in promissory estoppel is a representation that one party will not enforce his strict legal rights<sup>2</sup> and may be a representation of present or future intention not to do so<sup>3</sup>. The principle usually arises where there is a contract between A and B, and B subsequently grants to A a concession, not supported by consideration<sup>4</sup>, that he will not enforce a particular provision of their contract<sup>5</sup>. In the *High Trees* case usually regarded as the basis for the modern law of promissory estoppel<sup>6</sup>, a lease was entered into in 1937 in respect of a new block of flats in central London. The tenant experienced difficulty in sub-letting the flats due to war-time conditions and so the parties agreed that, whilst war-time conditions remained, the landlord would accept only half the ground rent. After the war, the landlord successfully claimed the other half of the ground rent in respect of the period after war-time conditions had ceased<sup>7</sup>, but the judge said that, if the landlord had claimed the other half of the rent in respect of the period whilst war-time conditions persisted, he would have failed<sup>8</sup>. Thus, as in *High Trees*, a person may promise to forgo part of a contractual payment<sup>9</sup>; or to allow more time for the performance of an obligation<sup>10</sup>; or to accept a less onerous way of performing the obligations under a contract<sup>11</sup>; or to forgive a breach of contract after it has taken place<sup>12</sup>; or to forgo the right to rely on a defence under the Limitation Act 1980<sup>13</sup>.

In the case of contracts involving periodic acts of performance the mere fact that B repeatedly indulges A by accepting late performance without complaint does not, however, raise the *High Trees* doctrine against B<sup>14</sup>; it has been said that any other rule would encourage contracting parties to insist on the very letter of their rights<sup>15</sup>. Similarly, the doctrine is not invoked simply because B has throughout insisted on strict compliance<sup>16</sup>; nor where B has threatened cancellation if A does not perform his promise<sup>17</sup>; nor where B has accepted inferior performance with an express reservation of his rights<sup>18</sup>; nor where B has accepted inferior performance either unwittingly<sup>19</sup>, or whilst continuing to demand full performance<sup>20</sup>; nor where B has remained silent about one defect whilst complaining about others<sup>21</sup>; nor where the parties knowingly carried out the terms of an agreement still subject to contract<sup>22</sup>.

1 As to the manner in which the representation may be made see PARA 1052 et seq ante.

2 See PARA 958 ante.

3 Cf *Jorden v Money* (1854) 5 HL Cas 185; and see PARA 1077 ante. It has been said that the doctrine extends to representations of law (see *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247, [1956] 1 WLR 29, CA, per Denning LJ, where, however, the majority of the court decided the appeal on the ground that there was a representation by conduct as to an existing fact); cf *Kai Nam v Ma Kam Chan* [1956] AC 358, [1956] 1 All ER 783n, PC; *London County Territorial and Auxiliary Forces Association v Nichols* [1949] 1 KB 35, [1948] 2 All ER 432, CA (representations regarding premises being rent-restricted); *Harnam Singh v Jamal Pirbhai* [1951] AC 688 at 699, PC.

4 In this respect, the *High Trees* doctrine is like a common law waiver: see CONTRACT vol 9(1) (Reissue) PARA 1027. Another approach is to reduce the requirements of the doctrine of consideration, eg by accepting a benefit in fact as sufficient consideration: see *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, CA; and CONTRACT vol 9(1) (Reissue) PARA 747; and see PARA 1084 post.

5 See *Tungsten Electric Co Ltd v Tool Metal Manufacturing Co Ltd* (1950) 69 RPC 108, CA (the pre-war royalty agreement had been suspended under the *High Trees* doctrine until proper notice).

6 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n.

7 le in respect of the second two quarters of 1945, the war having finished in June 1945. The claim seemingly falls under the principle that payment of a lesser sum does not satisfy a greater: see *Foakes v Beer* (1884) 9 App Cas 605, HL; and see PARA 1088 post.

8 *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n. Although the *High Trees* doctrine is often cited, it is, of course, only obiter dictum by a first instance judge: see PARA 958 note 6 ante.

9 As to promissory estoppel and obligations to pay money see further PARA 1088 post.

10 *Ledingham v Bermejo Estancia Co Ltd* [1947] 1 All ER 749 (promise to allow more time for the payment of interest, although in this case, although Denning J's judgment in *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n was one of the bases for the decision, it was held that the agreement was a binding contract since the offer contemplated legal relations, and the consideration for it was the company continuing to carry on; as to the relationship between promissory estoppel and the doctrine of consideration see PARA 1084 post); *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA (defendant led claimants to believe that he would not insist on stipulation as to time).

11 See eg *WJ Alan & Co v el Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA (contractual right to have payment by means of a letter of credit in Kenyan currency; sellers instead accepted a letter of credit in sterling); cf *Woodhouse AC Israel Cocoa Ltd SA v Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL.

12 See eg *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] QB 529, [1983] 1 All ER 301, CA; affd [1983] 2 AC 694, [1983] 2 All ER 763, HL.

13 See eg *Seechurn v Ace Insurance Sa-Nv (formerly Cigna Insurance Co of Europe Sa-Nv)* [2002] EWCA Civ 67, [2002] 2 Lloyd's Rep 390, [2002] All ER (D) 74 (Feb) (no such clear and unequivocal representation on the facts); *Co-operative Wholesale Society v Chester Le Street District Council* (1996) 73 P & CR 111, [1996] 2 EGLR 143, Lands Tribunal.

14 *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1981] 2 Lloyd's Rep 425 at 431 per Lloyd J; affd without reference to point [1983] QB 529, [1983] 1 All ER 301, CA; affd [1983] 2 AC 694, [1983] 2 All ER 763, HL.

15 *John Burrows Ltd v Subsurface Surveys Ltd* [1968] SCR 607, 68 DLR (2d) 354, Can SC; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657 at 660, [1955] 1 WLR 761 at 764, HL, obiter per Viscount Simonds.

16 *V Berg & Son Ltd v Vanden Avenne-Izegem PVBA* [1977] 1 Lloyd's Rep 499, CA. This is so even though B also starts to negotiate with A about a replacement contract: *Prosper Homes Ltd v Hambros Bank Executor and Trustee Co Ltd* (1979) 39 P & CR 395.

17 *Drexel Burnham Lambert International NV v Mohamed Schaker Salim Abou El Nasr and Etablissement Abou Nasr El Bassatni* [1986] 1 Lloyd's Rep 356.

18 *Finagrain SA Geneva v P Kruse Hamburg* [1976] 2 Lloyd's Rep 508, CA. See also *China-Pacific SA v Food Corp of India, The Winson* [1980] 3 All ER 556, [1980] 2 Lloyd's Rep 213, CA (a 'without prejudice' concession by B's solicitor); revsd on other grounds [1982] AC 939, [1981] 3 All ER 688, HL.

19 *Avimex SA v Dewulf & Cie* [1979] 2 Lloyd's Rep 57. Contra failure to object to a known defect within a reasonable time: *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia, The Laconia* [1977] AC 850, [1977] 1 All ER 545, HL (but no waiver, because unauthorised acceptance of under-payment by agent).

20 *China National Foreign Trade Transportation Corp v Evlogia Shipping Co SA of Panama, The Mihaios Xilas* [1979] 2 All ER 1044, [1979] 1 WLR 1018, HL; *Peter Cremer v Granaria BV* [1981] 2 Lloyd's Rep 583.

21 *Telfair Shipping Corp v Athos Shipping Co SA, The Athos* [1983] 1 Lloyd's Rep 127 at 135-136, CA, per Kerr LJ.

22 *A-G of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114, [1987] 2 All ER 387, PC.

## UPDATE

### 1083 Representation is a promise not to enforce strict legal rights

NOTE 22--See *Secretary of State for Transport v Christos* [2003] EWCA Civ 1073, [2004] 1 P & CR 228 (effect of offer being specified 'subject to contract' was that no legally binding contract would come into existence until written contracts were formally exchanged or unless that condition was waived).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(3) PROMISSORY ESTOPPEL/1084. Relationship with law of contract and the requirement of consideration.

#### **1084. Relationship with law of contract and the requirement of consideration.**

Promissory estoppel may prevent a party to a contract from going back on a concession he has made to the other party and so may modify contracts in the sense of suspending or even extinguishing contractual rights<sup>1</sup>. It is, however, well established in English law that the doctrine cannot create any new cause of action where none existed before<sup>2</sup> and thus cannot be used to create an enforceable contract in the absence of consideration<sup>3</sup>.

<sup>1</sup> See the authorities cited in PARA 1083 ante. Where the concession is in respect of an obligation to be performed within a certain time, the representor will, strictly speaking, never be able to revert to the strict contractual date for performance, but he may fix a new, reasonable, time limit: see PARA 1087 the text and note 5 post.

<sup>2</sup> *Combe v Combe* [1951] 2 KB 215, [1951] 1 All ER 767, CA; *Morrow v Carty* [1957] NI 174; *Mann v Sydney Hunt Motors (Pty) Ltd* 1958 (2) SA 102; *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314 at 324, [1960] 1 WLR 549 at 561 per Buckley J; affd on another point [1961] Ch 105, [1961] 1 All ER 90, CA. In this respect it differs from proprietary estoppel (see PARA 1089 et seq post) notwithstanding the suggestion to the contrary by Scarman LJ in *Crabb v Arun District Council* [1976] Ch 179 at 193, [1975] 3 All ER 865 at 875, CA. See also *Aquaflite Ltd v Jaymar International Freight Consultants Ltd* [1980] 1 Lloyd's Rep 36, CA; and cf *Re Wyvern Developments Ltd* [1974] 2 All ER 535 at 543, [1974] 1 WLR 1097 at 1104 obiter per Templeman J. See, however, para 1087 the text and notes 10-12 post. Moreover, the development of promissory estoppel in England and Wales differs significantly in this respect from the use of the concept elsewhere in the Commonwealth and in the United States of America: see eg *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387, HC of A; *W v G* (1996) 20 Fam LR 49, NSW SC; *Gray v National Crime Authority* [2003] NSWSC 111. See also the American Law Institute's *Restatement of the Law of Contracts (2d)* (1981) s 90.

<sup>3</sup> See eg *Combe v Combe* [1951] 2 KB 215 at 220, [1951] 1 All ER 767 at 770, CA, per Denning LJ ('seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind ... it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge.'). *Brikom Investments Ltd v Carr* [1979] QB 467 at 486, [1979] 2 All ER 753 at 761, CA, per Roskill LJ ('it would be wrong to extend the doctrine of promissory estoppel, whatever its precise limits at the present day, to the extent of abolishing in this back-handed way the doctrine of consideration'); *Syros Shipping Co SA v Elaghill Trading Co, The Proodos C* [1981] 3 All ER 189, [1980] 2 Lloyd's Rep 390 (shipowners negotiated with consignees for extra payment for the discharge of cargo free of any liens; in the absence of consideration they could not enforce that agreement or rely on equitable (ie promissory) estoppel as creating an independent cause of action). As to the doctrine of consideration see generally CONTRACT vol 9(1) (Reissue) PARA 727 et seq; and see in particular *Williams v Roffey Bros & Nicholls (Contractors) Ltd* [1991] 1 QB 1, [1990] 1 All ER 512, CA, discussed in CONTRACT vol 9(1) (Reissue) PARA 747.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(3) PROMISSORY ESTOPPEL/1085. Requirement of detrimental reliance.

### 1085. Requirement of detrimental reliance.

It is a requirement of promissory estoppel that the person to whom the representation was made must have acted in reliance on it<sup>1</sup>. Thus where the representation is a mere formality, shorn of any practical significance, there is no case for the operation of the doctrine of promissory estoppel<sup>2</sup>. However, to express this condition as a requirement that the person to whom it was made must have changed his position to his detriment has been judicially described as 'controversial'<sup>3</sup> and cases where the representation is a concession, suspending or releasing a contractual obligation, do not easily meet a requirement expressed in such terms<sup>4</sup>. It has been said that the fact that the promisee has not altered his position to his detriment is most material in determining whether it would be inequitable for the promisor to be permitted to act inconsistently with his promise<sup>5</sup>. This further requirement of unconscionability is discussed below<sup>6</sup>.

1 See PARA 1082 ante; and see eg *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556, [1964] 1 WLR 1326, PC; *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL; *P v P* [1957] NZLR 854; *IRC v Morris* [1958] NZLR 1126, NZ CA; *Beesly v Hallwood Estates Ltd* [1960] 2 All ER 314, [1960] 1 WLR 549; affd on other grounds [1961] Ch 105, [1961] 1 All ER 90, CA.

2 See *Emery v UCB Corporate Services Ltd* [2001] EWCA Civ 675, [2001] All ER (D) 226 (Apr). See also *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556, [1964] 1 WLR 1326, PC (representee failed to show inability to resume position); *Fontana NV v Mautner* [1980] 1 EGLR 68; *Bremer Handelsgesellschaft mbH v Bunge Corp* [1983] 1 Lloyd's Rep 476, CA; *Bremer Handelsgesellschaft mbH v Deutsche Conti-Handelsgesellschaft mbH* [1983] 2 Lloyd's Rep 45, CA; *Ets Soules & Cie v International Trade Development Co Ltd* [1980] 1 Lloyd's Rep 129, CA (A's conduct not prejudiced by B's promise); *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA.

3 See *Emery v UCB Corporate Services Ltd* [2001] EWCA Civ 675 at [28], [2001] All ER (D) 226 (Apr) per Peter Gibson LJ. See also *WJ Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 213, [1972] 2 All ER 127 at 140, CA, obiter per Lord Denning MR (no element of detriment is required).

4 See eg *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n; *WJ Alan & Co v el Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA; *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser* [1982] 1 All ER 19 at 27, [1981] 2 Lloyd's Rep 695 at 701 per Robert Goff J ('the representee may have benefited from the representation, and yet it may be inequitable, at least without reasonable notice, for the representor to enforce his legal rights'); *Youell v Bland Welch & Co Ltd (the 'Superhulls cover') Case (No 2)* [1990] 2 Lloyd's Rep 431 at 454-455 per Phillips J; *Vitol SA v Esso Australia Ltd, The Wise* [1989] 2 Lloyd's Rep 451 at 461, CA, per Mustill LJ. As to detrimental reliance generally see PARAS 1073-1075 ante.

5 *Emery v UCB Corporate Services Ltd* [2001] EWCA Civ 675 at [28], [2001] All ER (D) 226 (Apr) per Peter Gibson LJ.

6 See PARA 1086 post.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(3) PROMISSORY ESTOPPEL/1086. Requirement of unconscionability.

### **1086. Requirement of unconscionability.**

In order for a promissory estoppel to arise, it must be unconscionable for the promisor to resile from his promise<sup>1</sup>. The promisor can resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position and the promise becomes final and irrevocable only if the promisee cannot resume his position<sup>2</sup>. The fact that the promisee has not altered his position to his detriment is most material in determining whether it would be inequitable for the promisor to be permitted to act inconsistently with his promise<sup>3</sup>.

Unconscionable conduct by either party may decide the case against him because of the principle that he who comes to equity must come with clean hands<sup>4</sup>. Thus a creditor was not estopped from enforcing his legal rights against a debtor where the creditor's representation that such rights would not be enforced was made as a result of intimidation by the debtor<sup>5</sup>; and where a taxpayer company failed to honour its own obligations under a purported agreement with the Inland Revenue to pay tax as it fell due and to repay arrears at an agreed rate, it was stated that the Revenue would not have been estopped, even had its official had authority to make the agreement, from demanding payment of all the arrears and taking further action to enforce the debt<sup>6</sup>.

1 See eg *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA (where the older terminology 'inequitable' is used); *Société Italo-Belge pour le Commerce et l'Industrie SA v Palm and Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser* [1982] 1 All ER 19 at 27, [1981] 2 Lloyd's Rep 695 at 701 per Robert Goff J; *Emery v UCB Corporate Services Ltd* [2001] EWCA Civ 675, [2001] All ER (D) 226 (Apr).

2 *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556 at 559, [1964] 1 WLR 1326 at 1330, PC; and see *Kelsen v Imperial Tobacco Co (of Great Britain and Ireland) Ltd* [1957] 2 QB 334 at 343, [1957] 2 All ER 343 at 349 per McNair J; *Société Italo-Belge pour le Commerce et l'Industrie v Palm and Vegetable Oils (Malaysia) Sdn Bhd, The Post Chaser* [1982] 1 All ER 19, [1981] 2 Lloyd's Rep 695 (B asserted his strict legal rights only two days after he made the promise). See also *Banner Industrial and Commercial Properties Ltd v Clark Paterson Ltd* [1990] 2 EGLR 139.

3 *Emery v UCB Corporate Services Ltd* [2001] EWCA Civ 675 at [28], [2001] All ER (D) 226 (Apr) per Peter Gibson LJ. External circumstances may justify the promisor in going back on his promise, even if the promisee cannot resume his position: see eg *Williams v Stern* (1879) 5 QBD 409 (B held a bill of sale on A's furniture for a loan, but indicated to A after the latter's default that he 'would not look to a week'. Only three days later, B seized the furniture when he heard that A's landlord intended to distrain on it for arrears of rent). See also *Acomcrest Estates Ltd v National Westminster Bank plc* [2003] All ER (D) 82 (Jun).

4 See EQUITY vol 16(2) (Reissue) PARA 560; and see eg, in the context of proprietary estoppel, *Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ 873, [2003] All ER (D) 332 (Jun). As to proprietary estoppel see PARA 1089 et seq post.

5 *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA.

6 *Re Selectmove Ltd* [1995] 2 All ER 531, [1995] 1 WLR 474, CA.

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### 1087. Effect of promissory estoppel.

Promissory estoppel may be used as a defence to prevent the enforcement of a claim by suspending the promisee's legal obligations to the promisor, thus ensuring that a concession is not withdrawn<sup>1</sup>. Even where the representation that the promisor's legal rights will not be enforced appears to be open-ended, the court has discretion to order that they are to be temporarily suspended rather than extinguished<sup>2</sup>, although notice is necessary before they are resumed<sup>3</sup>. However, he will not then be able to complain that he did not receive his full legal rights whilst the doctrine operated<sup>4</sup>. Where the concession is in respect of an obligation to be performed within a certain time, the representor will, strictly speaking, never be able to revert to the strict contractual date for performance, but he may fix a new, reasonable, time limit<sup>5</sup>. In this very narrow sense, the original obligation may be said to be extinguished. The notice bringing an end to the operation of the doctrine need not be formal<sup>6</sup>. Exceptionally, a concession taking effect as a promissory estoppel may become permanently binding and extinguish an obligation if it ceases to be possible for the representee to revert to his original position<sup>7</sup>.

Promissory estoppel may also be used to prevent the use of a defence, for example a defence that the claimant is out of time, on the grounds that the defendant has promised not to invoke that defence<sup>8</sup>.

Promissory estoppel is not a cause of action in itself. It has been said that the *High Trees* principle operates as a shield, not as a sword<sup>9</sup>. It may not be true, however, to say that the principle can never operate except as a defence, for it seems that it might be a necessary foundation of a claim. Thus if a buyer (A) of goods due for delivery on 1 January agreed<sup>10</sup> at the request of the seller (B) to accept delivery on 2 January instead, A would be liable to be sued for damages for non-acceptance if he refused to take delivery on 2 January<sup>11</sup>. Similarly, the use of promissory estoppel to prevent B raising a limitation defence, as mentioned above, may enable A to sue on a contractual right<sup>12</sup>.

1 See eg *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n. As to release from non-contractual obligations see eg *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839 at 847, [1968] 2 All ER 987 at 991 per Donaldson J.

2 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n.

3 *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556 at 559, [1964] 1 WLR 1326 at 1330, PC; and see eg *Zockoll Group Ltd v Mercury Communications Ltd* (19 December 1997, unreported); affd [1999] EMLR 385, CA.

4 *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL (royalty in respect of material produced whilst the concession continued); *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA (landlord could not claim an annual contribution in respect of the roof repairs for which he represented he would be responsible).

5 *Hughes v Metropolitan Rly Co* (1877) 2 App Cas 439, HL; *Birmingham and District Land Co v London and North Western Rly Co* (1888) 40 ChD 268, CA; *Brickwoods Ltd v Butler and Walters* (1969) 21 P & CR 256, CA.

6 *Ajayi v RT Briscoe (Nigeria) Ltd* [1964] 3 All ER 556 at 559, [1964] 1 WLR 1326 at 1330, PC, obiter; see also *Tool Metal Manufacturing Co Ltd v Tungsten Electric Co Ltd* [1955] 2 All ER 657, [1955] 1 WLR 761, HL (unsuccessful counterclaim for previous instalments of royalties sufficient notice for reversion to old arrangements in the future).

7 *Birmingham and District Land Co v London and North Western Ry Co* (1888) 40 ChD 268, CA. The estoppel was also final in *Durham Fancy Goods Ltd v Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839, [1968] 2 All ER 987, but this was not a case of a concession taking effect on a pre-existing contractual obligation.

8 See eg *Nippon Yusen Kaisha v Pacifica Navegacion SA, The Ion* [1980] 2 Lloyd's Rep 245.

9 *Combe v Combe* [1951] 2 KB 215 at 224, [1951] 1 All ER 767 at 772, CA, per Birkett LJ; *Lark v Outhwaite* [1991] 2 Lloyd's Rep 132 at 142 per Hirst J; *Hiscox v Outhwaite (No 3)* [1991] 2 Lloyd's Rep 524 at 535 per Evans J; cf *Robertson v Minister of Pensions* [1949] 1 KB 227, [1948] 2 All ER 767 (representee was plaintiff, but the real cause of action was a statutory right).

10 Ie without the consideration necessary to constitute a binding variation moving from the seller: see CONTRACT vol 9(1) (Reissue) PARA 1023.

11 Cf *Hartley v Hymans* [1920] 3 KB 475, which seems to be primarily a case of waiver. See also *Lyle-Meller v A Lewis & Co (Westminster) Ltd* [1956] 1 All ER 247, [1956] 1 WLR 29, CA.

It has also been suggested that promissory estoppel may give rise to a cause of action where the promisor knows and intends that the promisee will irretrievably alter his position in reliance on the promise: *Re Wyvern Developments Ltd* [1974] 2 All ER 535 at 543, [1974] 1 WLR 1097 at 1104 obiter per Templeman J.

12 See note 8 supra. See also *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 at 111 per Thomas J; and see *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84 at 131-132, [1981] 3 All ER 577 at 591, CA, per Brandon LJ ('while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed'). A claim may succeed only because the defendant is estopped from denying that a contractual term bears a particular construction (*De Tchihatchef v Salerni Coupling Ltd* [1932] 1 Ch 330); or from denying the existence of a particular term in the contract (*Hiscox v Outhwaite (No 3)* [1991] 2 Lloyd's Rep 524 at 532 et seq per Evans J); or from denying that he is a party to the contract (*Pacol Ltd v Trade Lines Ltd and R/I Sif IV, The Henrik Sif* [1982] 1 Lloyd's Rep 456; *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep 159, [1999] 2 All ER (Comm) 453). Further, estoppel may be invoked as the basis for purely declaratory relief: see eg *Dun & Bradstreet Software Services (England) Ltd v Provident Mutual Life Insurance Association* [1998] 2 EGLR 175, CA; *Society of Lloyd's v Morris* (28 May 1993, unreported), CA.



Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/(3) PROMISSORY ESTOPPEL/1088. Promissory estoppel and obligations to pay money.

### **1088. Promissory estoppel and obligations to pay money.**

It is a long-established rule under the law of contract that payment of part of a debt, or a promise to pay part, is not consideration for the release of the balance<sup>1</sup>. Further, it is sometimes suggested that the *High Trees* doctrine can never have anything other than a merely suspensory effect in relation to an obligation to pay money, since, short of illegality, performance of a promise to pay money is never impossible in law<sup>2</sup>. Where a debt is for a discrete sum but the creditor has promised to accept a lesser sum in full satisfaction, it seems that promissory estoppel may not always be used to enforce his promise<sup>3</sup>. It has been suggested that the creditor's concession will be permanent where it is highly inequitable to allow him to resile from it<sup>4</sup>. Furthermore, where the debtor's obligation is to make periodical payments such as for rent the creditor's promise to accept a lesser sum, or even no sum at all, for a period will afford the debtor a defence to a claim for full payment of those instalments<sup>5</sup>.

1 See *Pinnel's Case* (1602) 5 Co Rep 117a; *Foakes v Beer* (1884) 9 App Cas 605, HL; and CONTRACT vol 9(1) (Reissue) PARA 1045.

2 See CONTRACT vol 9(1) (Reissue) PARA 900 note 1.

3 *Jorden v Money* (1854) 5 HL Cas 185; *Re Selectmove Ltd* [1995] 2 All ER 531, [1995] 1 WLR 474, CA; and see *Re C (a debtor)* (11 May 1994, unreported), CA; *Bradshaw v McMullan* [1920] 2 IR 412 at 419, HL (acceptance by a creditor, in payment of a recurring liability, of a sum less than he is entitled to demand, does not forever estop him from insisting upon being paid what is legally due to him in respect of future payments); *MacLaine v Gatty* [1921] 1 AC 376, HL (creditor who, under an agreement to accept interest at a lower rate on punctual payment, had on one occasion accepted interest at the lower rate after the agreed date, not estopped from insisting on his right to have payment at the higher rate on a subsequent failure to make punctual payment). In *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA, Lord Denning MR suggested that where a lesser sum was accepted, promissory estoppel might operate to extinguish the obligation to pay the balance; but in that case the debtor's intimidatory conduct meant that relief was denied. The effect of an estoppel may, however be indirectly to reduce the amount of a single payment: see eg *WJ Alan & Co v El Nasr Export and Import Co* [1972] 2 QB 189, [1972] 2 All ER 127, CA (acceptance of payment in sterling, which cost the buyers less after devaluation than payment in foreign currency).

4 *Nippon Yusen Kaisha v Pacifica Navegacion SA, The Ion* [1980] 2 Lloyd's Rep 245; *Maharaj v Chand* [1986] AC 898, [1986] 3 All ER 107, PC. It may therefore be that where the creditor (B), by a promise of forbearance, has led the debtor (A) to undertake a new commitment which would make full payment of the debt onerous to him and thereby inequitable, the *High Trees* doctrine will have a permanent effect even though, strictly speaking, impossibility to pay cannot be shown: see the judicial suggestions to this effect in *D & C Builders Ltd v Rees* [1966] 2 QB 617, [1965] 3 All ER 837, CA; and see also *Brikom Investments Ltd v Carr* [1979] QB 467, [1979] 2 All ER 753, CA.

5 See *Central London Property Trust Ltd v High Trees House Ltd* [1947] KB 130, [1956] 1 All ER 256n. Cf, however, note 3 supra.

## **UPDATE**

### **1088 Promissory estoppel and obligations to pay money**

TEXT AND NOTES 3, 4--Cf *Collier v P & MJ Wright (Holdings) Ltd* [2007] EWCA Civ 1329, [2008] 1 WLR 643 (estoppel prevents creditor from enforcing full debt where he agrees to take part-payment in satisfaction of total sum due).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/ (4) PROPRIETARY ESTOPPEL/1089. Elements in the estoppel.

#### **(4) PROPRIETARY ESTOPPEL**

##### **1089. Elements in the estoppel.**

Proprietary estoppel usually arises when the representation consists of a promise of an interest in land<sup>1</sup> although its principles have been used in the context of commercial relationships not involving such a promise<sup>2</sup>. The traditional formulation was based on the principle that, where the owner of land (A) knowingly allowed his rights to be infringed by another (B) who expended money on the land in the mistaken belief that it belonged to B, A could not afterwards be allowed to assert his own title to the land<sup>3</sup>. From this formulation a five-fold test, referred to as 'the five probanda', developed, under which the following circumstances had to be present<sup>4</sup> in order that an estoppel might be raised against A<sup>5</sup>:

- 18 (1) B must be mistaken as to his own legal rights; if he is aware that he is infringing the rights of another, he takes the risk of those rights being asserted<sup>6</sup>;
- 19 (2) B must expend money, or do some act, on the faith of his mistaken belief<sup>7</sup>; otherwise, he does not suffer by A's subsequent assertion of his rights;
- 20 (3) acquiescence<sup>8</sup> is founded on conduct with a knowledge of one's legal rights, and hence A must know of his own rights<sup>9</sup>;
- 21 (4) A must know of B's mistaken belief; with that knowledge it is inequitable for him to keep silence and allow B to proceed on his mistake<sup>10</sup>;
- 22 (5) A must encourage B in his expenditure of money or other act, either directly or by abstaining from asserting his legal right<sup>11</sup>.

This five-fold test has, however, now largely been abandoned in favour of a three-fold inquiry based not on B's mistake but on an agreement between A and B or on A's encouragement of B's expectation<sup>12</sup>. The court will inquire:

- 23 (a) whether an equity in favour of B arises out of the conduct and relationship of the parties;
- 24 (b) what is the extent of the equity, if one is established; and
- 25 (c) what is the relief appropriate to satisfy the equity<sup>13</sup>.

The fundamental principle that equity is concerned to prevent unconscionable conduct permeates all the elements of the doctrine of proprietary estoppel; in the end the court must look at the matter in the round<sup>14</sup>.

Proprietary estoppel must be distinguished from the doctrine of constructive trust<sup>15</sup> but the two concepts may coincide in the area of a joint enterprise for the acquisition of land<sup>16</sup>.

Whether the principle is called proprietary estoppel, estoppel by acquiescence or estoppel by encouragement has been said to be really immaterial<sup>17</sup>.

Unlike other kinds of estoppel, proprietary estoppel may be a cause of action<sup>18</sup> but only where it involves the promise of an interest in land<sup>19</sup>.

1 See PARA 959 ante.

2 See note 17 infra; and PARA 956 note 8 ante.

3 See *Ramsden v Dyson and Thornton*(1866) LR 1 HL 129 at 140-141 per Lord Cranworth LC.

4 See *Electrolux Ltd v Electrix Ltd* (1953) 71 RPC 23 at 33, CA, per Evershed MR; *E & L Berg Homes Ltd v Grey* (1979) 253 Estates Gazette 473, CA; *Coombes v Smith* [1986] 1 WLR 808.

5 *Willmott v Barber*(1880) 15 ChD 96 at 105 per Fry J; *Civil Service Musical Instrument Association v Whiteman* (1899) 68 LJ Ch 484; *Crabb v Arun District Council*[1976] Ch 179, [1975] 3 All ER 865, CA; *Coombes v Smith* [1986] 1 WLR 808; *Brinnand v Ewens*[1987] 2 EGLR 67, CA; and see *Hoare v Kingsbury Urban Council*[1912] 2 Ch 452 at 465; *Jones Bros (Holloway) Ltd v Woodhouse*[1923] 2 KB 117 at 128; *Ward v Kirkland*[1967] Ch 194 at 238, [1966] 1 All ER 609 at 623; *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*[1971] AC 850 at 884, [1970] 2 All ER 871 at 895, HL, per Lord Diplock.

6 If a person builds on another's land, knowing him to be the owner of that land, there is no principle of equity which would prevent the owner from claiming the land with the benefit of all the expenditure on it: *Ramsden v Dyson and Thornton*(1866) LR 1 HL 129 at 141 per Lord Cranworth LC; *McBean v Howey* [1958] NZLR 25; cf *Rennie v Young* (1858) 2 De G & J 136; Story, Equity Jurisprudence s 385.

7 *Dann v Spurrier* (1802) 7 Ves 231 at 235; *Rochdale Canal Co v King* (1851) 2 Sim NS 78; *Archbold v Scully* (1861) 9 HL Cas 360 at 383. In other words, his position must be altered by reason of the acquiescence: *O'Connor v O'Connor* (1916) 50 ILT 103; *Re Essoldo (Bingo) Ltd's Underlease, Essoldo Ltd v Elcresta Ltd* (1971) 23 P & CR 1; *Accuba Ltd v Allied Shoe Repairs Ltd*[1975] 3 All ER 782 at 787, [1975] 1 WLR 1559 at 1564 per Goff J. The principles of proprietary estoppel cannot be applied when, at the time of the relevant expenditure, there was already a bare trust arising in consequence of an enforceable contract to the same effect as the interest sought pursuant to the proprietary estoppel: *Lloyds Bank plc v Carrick*[1996] 4 All ER 630, 73 P & CR 314, CA. See also *Gillett v Holt*[2001] Ch 210, [2000] 2 All ER 289, CA (the detriment suffered does not have to be of a financial nature, but it must be substantial).

8 It is not clear whether a public official, like the custodian of enemy property, can abandon his rights by acquiescence: see *Re Aramayo Francke Mines Ltd*[1921] 1 Ch 675 at 695, CA; on appeal sub nom *Aramayo Francke Mines Ltd v Public Trustee*[1922] 2 AC 406 at 412, HL. As to the equitable doctrine of acquiescence see EQUITY vol 16(2) (Reissue) PARA 909.

9 *Willmott v Barber*(1880) 15 ChD 96 at 105; *Armstrong v Sheppard and Short Ltd*[1959] 2 QB 384, [1959] 2 All ER 651, CA (A could enforce his legal rights as he had assented to B's activities in ignorance of his (A's) ownership of the land affected); and see *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co*[1964] Ch 303 at 353, [1963] 3 All ER 1 at 20, CA.

10 See *Russell v Watts*(1883) 25 ChD 559 at 576, CA, per Cotton LJ (not affected by the reversal of the decision on appeal (1885) 10 App Cas 590, HL). It is his duty to be active and to state his adverse title: *Ramsden v Dyson and Thornton*(1866) LR 1 HL 129 at 141, cited in *Ward v Kirkland*[1967] Ch 194 at 235, [1966] 1 All ER 609 at 621-622 per Ungood-Thomas J. See also *Spiro v Lintern*[1973] 3 All ER 319, [1973] 1 WLR 1002, CA (B's mistaken belief that A is under a binding obligation to him); *Pacol Ltd v Trade Lines Ltd and R/I Sif IV, The Henrik Sif*[1982] 1 Lloyd's Rep 456. The duty to give information is, of course, still greater when the person standing by and permitting expenditure by another is in a fiduciary relation to that other: see *Lord Cawdor v Lewis* (1835) 1 Y & C Ex 427. See also *JF Perrott & Co Ltd v Cohen*[1951] 1 KB 705, [1950] 2 All ER 939, CA (tenant who had encroached on a building belonging to the landlord not allowed to avoid paying for repairs to it by alleging that it did not form part of the lease).

11 The encouragement may be active or passive: *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd*[1971] AC 850 at 884, [1970] 2 All ER 871 at 895, HL, per Lord Diplock; and see *Ward v Kirkland*[1967] Ch 194 at 239, [1966] 1 All ER 609 at 624. The estoppel is founded on the consideration that it is fraudulent under the circumstances for A not to give notice to B: see *Savage v Foster* (1723) 9 Mod Rep 35 at 37; 1 White & Tud LC (9th Edn) 396. If he gives notice of a claim, however, this is sufficient to avoid the equity against him, even if he does not repeat it while the expenditure is being incurred, and even if the claim is excessive: *Master or Keeper, Fellows, and Scholars of Clare Hall v Harding* (1848) 6 Hare 273. A mortgagee who stands by in proceedings relating to the subject matter of his security may lose his priority: *Re Pain, Gustavson v Haviland*[1919] 1 Ch 38. See also *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA, The Leonidas D*[1985] 2 All ER 796, [1985] 1 WLR 925, CA; *Matharu v Matharu* (1994) 68 P & CR 93, [1994] 3 FCR 216, CA (no beneficial interest acquired in property on basis of proprietary estoppel); *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113, 64 P & CR 233, PC; *JS Bloor (Measham) Ltd v Calcott*[2002] 1 EGLR 1, [2002] 09 EG 222 (nothing in the Agricultural Holdings Act 1986 prevented a claim to proprietary estoppel against the tenant of an agricultural holding by reason of his conduct).

12 The basis of this development is the dissenting judgment of Lord Kingsdown in *Ramsden v Dyson and Thornton*(1866) LR 1 HL 129 ('if a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation, created or encouraged by the landlord, that he shall have a certain interest, take possession of such land, with the consent of the landlord, and upon the faith of

such promise or expectation, with the knowledge of the landlord, and without objection by him, lays out money upon the land, a court of equity will compel the landlord to give effect to such promise or expectation': *Ramsden v Dyson and Thornton* supra at 170). It seems that under this analysis both parties may be mistaken as to the true situation: see *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n, [1981] 1 All ER 897.

13 *Crabb v Arun District Council* [1976] Ch 179 at 193, [1975] 3 All ER 865 at 875, CA, per Scarman LJ.

14 *Gillett v Holt* [2001] Ch 210 at 225, [2000] 2 All ER 289 at 301, CA, per Robert Walker LJ.

15 As to constructive trusts see EQUITY vol 16(2) (Reissue) PARA 852; TRUSTS vol 48 (2007 Reissue) PARA 687 et seq.

16 See *Yaxley v Gotts* [2000] Ch 162 at 176, [2000] 1 All ER 711 at 721-722, CA, per Robert Walker LJ. Cf *Re Basham* [1987] 1 All ER 405 at 410, [1986] 1 WLR 1498 at 1504, where proprietary estoppel was described by Edward Nugee QC, sitting as a deputy judge of the High Court, as 'properly to be regarded as giving rise to a species of constructive trust'; and see also *Chan Pui Chun v Leung Kam Ho* [2002] EWCA Civ 1075 at [91], [2003] 1 FCR 520, [2003] 1 P & CR D2 per Jonathan Parker LJ.

17 *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n at 151n, [1981] 1 All ER 897 at 915 per Oliver J. See also *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84 at 103-104, [1981] 1 All ER 923 at 935-936 per Robert Goff J; affd [1982] QB 84 at 122, [1981] 3 All ER 577 at 584, CA, per Lord Denning MR; *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650, [1981] 1 WLR 1265, CA; *A-G of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114, [1987] 2 All ER 387, PC. There is no hard and fast rule that ignorance of a legal right is a bar to acquiescence in a breach of trust, but the whole of the circumstances must be looked at to see whether it is just that a complaining beneficiary should succeed against a trustee: *Re Pauling's Settlement Trusts, Younghusband v Coutts & Co* [1961] 3 All ER 713 at 730, [1962] 1 WLR 86 at 108 per Wilberforce J; affd [1964] Ch 303, [1963] 3 All ER 1, CA; *Holder v Holder* [1968] Ch 353 at 379, [1968] 1 All ER 665, CA.

Thus principles derived from proprietary estoppel may be used in commercial contexts not involving land: see *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84, [1982] 3 All ER 577, CA; and see also *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650, [1981] 1 WLR 1265, CA; *Re Goldcorp Exchange Ltd (in receivership)* [1994] 2 All ER 806, PC.

18 See eg *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 100, [2003] 1 FCR 501 (claim against deceased's estate; claimant relying, inter alia, on proprietary estoppel); *Jiggins v Brisley* [2003] All ER (D) 319 (Apr) (claimant commencing proceedings claiming that property was, or should be declared to be, held on trust for her, and seeking transfer into her name; alternatively, claiming that she was entitled to the property by virtue of proprietary estoppel); and see *Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498; *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, CA; *Newman v Blanton* [2002] All ER (D) 107 (Jun); *Ottey v Grundy* [2003] All ER (D) 05 (Aug), CA.

19 As to the general principle that estoppel by representation cannot be used as a cause of action see eg *Combe v Combe* [1951] 2 KB 215, [1951] 1 All ER 767, CA; *Short v British Railways Board* [1974] 3 All ER 28 at 33, [1974] 1 WLR 781 at 787 per Latey J (estoppel 'a shield not a spear'); *Argy Trading Development Co Ltd v Lapid Developments Ltd* [1977] 3 All ER 785, [1977] 1 WLR 444; *Syros Shipping Co SA v Elaghill Trading Co, The Proodos C* [1981] 3 All ER 189, [1980] 2 Lloyd's Rep 390; *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204 at 218, CA, per Megaw LJ. Cf the suggestion to the contrary in *Azov Shipping Co v Baltic Shipping Co* [1999] 2 Lloyd's Rep 159 at 175, [1999] 2 All ER (Comm) 453 at 476 obiter per Colman J ('the sword/shield dichotomy represents a largely inaccurate description of the availability of remedies to a party who relies on an estoppel. It should be regarded as confined to the protection of consideration and as having no general application in the field of estoppel'); and see PARA 1087 the text and notes 10-12 ante. As to the use of proprietary estoppel as a cause of action in relation to interests in land see the text and note 18 supra.

## UPDATE

### 1089 Elements in the estoppel

NOTE 14--See also *Wormall v Wormall* [2004] All ER (D) 398 (Nov), CA.

NOTE 16--See also *S v S* [2006] EWHC 2892 (Fam), [2007] 1 FLR 1123; *S v R; R v M* [2008] EWHC 1874 (Fam), [2008] All ER (D) 146 (Aug).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/ (4) PROPRIETARY ESTOPPEL/1090. The representation.

### 1090. The representation.

As already discussed, a representation may be made by words or conduct (including silence, inaction or negligence) or may arise as a result of an agreement between the parties<sup>1</sup>. The traditional analysis of proprietary estoppel depended on the acquiescence by one party in the other's mistaken belief as to his rights<sup>2</sup>. Such acquiescence may be silent or inactive or may take the form of active encouragement<sup>3</sup>.

The modern emphasis is on a representation by one party (A) giving rise to an expectation in the other party (B)<sup>4</sup>. There may be a definite assurance, or series of assurances, by A, for example that B will have a home for life<sup>5</sup> or be left property in a will<sup>6</sup>; or there may be an implied assurance as a result of A's conduct, for example an assurance that B will be able to have a right of access over A's land<sup>7</sup>. The court considers whether the quality of the assurances giving rise to B's expectation and the extent of B's detrimental reliance on those assurances in combination make it unconscionable for A to go back on them<sup>8</sup>. Representations made in the course of subject to contract negotiations do not satisfy this test<sup>9</sup>; and a longstanding practice cannot be converted into a representation or assurance sufficient to found a proprietary estoppel merely because it might have been reasonable for the other party to incur expenditure on the basis that that practice was likely to continue into the future<sup>10</sup>.

1 See PARA 1052 et seq ante.

2 See PARA 1089 the text and notes 3-11 ante.

3 *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 884, [1970] 2 All ER 871 at 895, HL, per Lord Diplock; and see *Ward v Kirkland* [1967] Ch 194 at 239, [1966] 1 All ER 609 at 624.

4 See PARA 1089 the text and notes 12-14 ante.

5 *Campbell v Griffin* [2001] EWCA Civ 990, 82 P & CR D43, [2001] All ER (D) 294 (Jun).

6 *Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498; *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, CA; *Newman v Blanton* [2002] All ER (D) 107 (Jun); *Ottey v Grundy* [2002] All ER (D) 236 (Nov); *Jiggins v Brisley* [2003] All ER (D) 319 (Apr).

7 *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA.

8 See eg *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, CA; *Newman v Blanton* [2002] All ER (D) 107 (Jun); *Ottey v Grundy* [2002] All ER (D) 236 (Nov). As to detrimental reliance and unconscionability see further PARA 1068 et seq ante, para 1091 post.

9 See eg *London and Regional Investments Ltd v TBI plc* [2002] EWCA Civ 355, [2002] All ER (D) 360 (Mar) (joint venture negotiations subject to contract; no prospect of establishing estoppel affecting relevant two areas of land); *James v Evans* [2000] 3 EGLR 1, [2000] All ER (D) 1014, CA (defendant submitting that claimant, the deceased's executor, estopped from claiming possession of hill farm on basis of proprietary estoppel coming into existence as a result of negotiations between himself and deceased which had led to his taking over responsibility for the flock of sheep; held that requirement to take over and care for flock had been made known to the defendant before he entered into negotiations for the tenancy and was an ordinary incident of granting of tenancy of a hill farm; defendant always aware that entire negotiation carried on 'subject to contract'; no proprietary estoppel).

10 *Keelwalk Properties Ltd v Waller, Keelwalk Properties Ltd v Griffith* [2002] EWCA Civ 1076, [2002] All ER (D) 467 (Jul).

### UPDATE

### **1090 The representation**

NOTES 5, 6--To require precise extent of property to be strictly defined in every case would be regrettable and substantial emasculation of principle of proprietary estoppel: *Thorner v Major* [2009] UKHL 18, [2009] 3 All ER 945.

NOTE 9--See also *Cobbe v Yeomans Row Management Ltd* [2008] UKHL 55, [2008] 4 All ER 713 (oral agreement 'in principle' to buy property if planning permission obtained did not give rise to estoppel); *Herbert v Doyle* [2008] EWHC 1950 (Ch), [2009] WTLR 589, [2008] All ER (D) 40 (Aug).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/ (4) PROPRIETARY ESTOPPEL/1091. Unconscionability.

### 1091. Unconscionability.

If the promisee (B) spends money on the promisor's (A's) land or otherwise acts to his detriment<sup>1</sup> believing that the land belongs to B or that B has or will obtain some interest in the land and A, knowing of B's mistaken belief, stands by while the money is being spent or encourages the expenditure, A may not be heard to assert his title to the land so as to defeat B's expectation at least without compensating B for his expenditure<sup>2</sup>. The principle also applies where B spends money or takes some other action in relation to his own land in the belief that he has been, or will be<sup>3</sup>, granted some interest in or right over A's land, when A may be compelled to give effect to the belief or expectation<sup>4</sup>. The detriment need not, however, consist of the expenditure of money or other quantifiable financial detriment, so long as it is something substantial. The requirement must be approached by the court as part of a broad inquiry as to whether repudiation of an assurance is or is not unconscionable in all the circumstances<sup>5</sup>. Moreover, the circumstances may include the respective needs of the parties<sup>6</sup>.

Thus an equity may arise in favour of the promisee because it would be unconscionable for the promisor to go back on his promise. Unconscionable behaviour on the part of the promisee may, however, prevent such an equity from arising<sup>7</sup>.

There must have been detrimental reliance<sup>8</sup>; and except, perhaps, in the case of a joint enterprise, the detriment must have been suffered by the claimant personally<sup>9</sup>.

1 *Greasley v Cooke* [1980] 3 All ER 710, [1980] 1 WLR 1306, CA (assurances given by plaintiffs that defendant could remain in home for as long as she wished raised an equity in defendant's favour and a presumption that defendant had acted on the faith of the assurances; Lord Denning MR's observations on the need for the defendant to prove that she had acted to her detriment explained in *Watts and RReady v Storey* (1983) 134 NLJ 631, CA; distinguished in *Watkins v Emslie* (1982) 261 Estates Gazette 1192, CA; *Bostock v Bryant* (1990) 22 HLR 449, CA; and see *Stevens & Cutting Ltd v Anderson* [1990] 1 EGLR 95, CA. See also *Century (UK) Ltd SA v Clibbery* [2003] All ER (D) 308 (Jul).

2 See eg *Ramsden v Dyson and Thornton* (1866) LR 1 HL 129 at 140 per Lord Cranworth LC ('if a stranger begins to build on my land supposing it to be his own, and I, perceiving his mistake, abstain from setting him right, and leave him to persevere in his error, a court of equity will not allow me afterwards to assert my title to the land on which he had expended money on the supposition that the land was his own'); *Inwards v Baker* [1965] 2 QB 29, [1965] 1 All ER 446, CA; *ER Ives Investment Ltd v High* [1967] 2 QB 379 at 400, [1967] 1 All ER 504 at 511, CA, per Danckwerts LJ (right of way); *Ward v Kirkland* [1967] Ch 194, [1966] 1 All ER 609 (right of drainage); *Jones (AE) v Jones (FW)* [1977] 2 All ER 231, [1977] 1 WLR 438, CA.

3 *Ramsden v Dyson and Thornton* (1866) LR 1 HL 129 at 170 per Lord Kingsdown. This was a dissenting judgment but the principle was affirmed and approved in *Plimmer v City of Wellington Corp'n* (1884) 9 App Cas 699 at 713, PC, and accepted in *Inwards v Baker* [1965] 2 QB 29, [1965] 1 All ER 446, CA. See also *Holiday Inns Inc v Broadhead* (1974) 232 Estates Gazette 951; *Crabb v Arun District Council* [1976] Ch 179 at 193, [1975] 3 All ER 865 at 876, CA, per Scarman LJ; and see PARA 1089 the text and notes 12-14 ante.

4 *Willmott v Barber* (1880) 15 ChD 96 at 105-106 per Fry J; *Crabb v Arun District Council* [1976] Ch 179 at 193-195, [1975] 3 All ER 865 at 876-877, CA, per Scarman LJ (defendant landowner who led plaintiff, an adjoining landowner, to believe that plaintiff would be granted a right of way over defendant's land and stood by while plaintiff, relying on his belief, sold part of his land without reserving any right of way for the benefit of the remainder, compelled to grant plaintiff right of way); applied in *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* (1980) 41 P & CR 179 (principle of proprietary estoppel extended to the disposal of an interest in land where the disposal is closely linked with the acquisition of an interest in land). See also *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n, [1981] 1 All ER 897 (no interest arising from expenditure in the hope of obtaining right as opposed to expenditure on basis of belief aroused by landowner); *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204, CA (expenditure on plaintiff's own land in hope of obtaining planning permission; equitable principle applicable only to expectation of interest in third party's land; as to the

inappropriateness of importing the private law doctrine of proprietary estoppel into public law see PARA 961 ante); *Coombes v Smith* [1986] 1 WLR 808 (plaintiff's belief that she would be provided for did not amount to belief that she would be entitled to occupy house against the defendant's wishes); *Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498 (deceased had promised to leave his estate to plaintiff in return for her unpaid personal services; proprietary estoppel a form of constructive trust; but cf *Layton v Martin* [1986] 2 FLR 227 (proprietary estoppel applicable to specific asset only)); *Lim Teng Huan v Ang Swee Chuan* [1992] 1 WLR 113, PC. No estoppel arises following expenditure pending conclusion of contract in the absence of encouragement: *A-G of Hong Kong v Humphreys Estate (Queens Gardens)* [1987] AC 114, [1987] 2 All ER 387, PC, distinguishing *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* supra.

5 *Gillet v Holt* [2001] Ch 210 at 232, [2000] 2 All ER 289 at 308, CA, per Robert Walker LJ. See also *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA; *Shaw v Applegate* [1978] 1 All ER 123 at 131, [1977] 1 WLR 970 at 978, CA, per Buckley LJ; *HP Bulmer Ltd and Showerings Ltd v J Bollinger SA and Champagne Lanson Père et Fils* [1978] RPC 79 at 135, CA, per Goff LJ; *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd, Old & Campbell Ltd v Liverpool Victoria Friendly Society* [1982] QB 133n at 151n, 152n, [1981] 1 All ER 897 at 915 per Oliver J ('whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment'); *Amalgamated Investment & Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1982] QB 84, [1981] 1 All ER 923, (affd [1982] QB 84, [1981] 3 All ER 577, CA); *Habib Bank Ltd v Habib Bank AG Zurich* [1981] 2 All ER 650, [1981] 1 WLR 1265, CA; *Pacol Ltd v Trade Lines Ltd and R/I Sif IV, The Henrik Sif* [1982] 1 Lloyd's Rep 456; *Hoover plc v George Hulme (Stockport) Ltd and Hulme* [1982] FSR 565; *British Leyland Motor Corp v Armstrong Patents Co Ltd* [1982] FSR 481 (affd [1986] RPC 279, CA; revsd without discussion of this point [1986] AC 577, [1986] 1 All ER 850, HL); *My Kinda Town Ltd v Soll* [1983] RPC 15 at 44 per Slade J; *Government of Swaziland Central Transport Administration and Alfko Aussenhandels GmbH v Leila Maritime Co Ltd and Mediterranean Shipping Co SA, The Leila* [1985] 2 Lloyd's Rep 172; *A-G of Hong Kong v Humphreys Estate (Queen's Gardens) Ltd* [1987] AC 114, [1987] 2 All ER 387, PC; *Hammersmith and Fulham London Borough Council v Top Shop Centres Ltd* [1990] Ch 237, [1989] 2 All ER 655; *Rafsanjan Pistachio Producers Co-operative v Reiss* [1990] BCLC 352; *Jones (AE) v Jones (FW)* [1977] 2 All ER 231, [1977] 1 WLR 438, CA; *Re Sharpe (a bankrupt), ex p Trustee of the bankrupt v Sharpe* [1980] 1 All ER 198, [1980] 1 WLR 219; *Western Fish Products Ltd v Penwith District Council* [1981] 2 All ER 204, CA; *Salvation Army Trustee Co Ltd v West Yorkshire Metropolitan County Council* (1980) 41 P & CR 179; *Ind Coope Ltd v Paine & Co Ltd* [1983] RPC 326; *Weir Pumps Ltd v CML Pumps Ltd* [1984] FSR 33; *Central Street Properties Ltd v Mansbrook Rudd & Co Ltd* [1986] 2 EGLR 33; *Grant v Edwards* [1986] Ch 638 at 656-657, [1986] 2 All ER 426 at 439, CA, per Browne-Wilkinson V-C (drawing an analogy between proprietary estoppel and constructive trust); *Shelley v United Artists Corp* (1988) 59 P & CR 34; *Preston and Henderson v St Helens Metropolitan Borough Council* (1989) 58 P & CR 500, Lands Tribunal; *Bennett v Bennett* (18 May 1990, unreported), CA; *JT Development Ltd v Quinn* (6 December 1990, unreported), CA; *Guestheath Ltd v Mirza* (1990) 22 HLR 399, [1990] 2 EGLR 111, CA (no unconscionability); *Wayling v Jones* (1993) 69 P & CR 170, [1996] 2 FCR 41, CA (working for low wages); *James v Evans* [2000] 3 EGLR 1, [2000] All ER (D) 1014, CA (taking over and caring for flock of sheep; no question of unconscionability); *Jennings v Rice* [2002] EWCA Civ 159, [2003] 1 P & CR 100, [2003] 1 FCR 501 (caring for the deceased without payment); *Ottey v Grundy* [2002] All ER (D) 236 (Nov) (coping with deceased's alcoholism and putting own career on hold).

6 See eg *Sledmore v Dalby* (1996) 72 P & CR 196, CA.

7 See eg *Gonthier v Orange Contract Scaffolding Ltd* [2003] EWCA Civ 873, [2003] All ER (D) 332 (Jun).

8 See eg *Taylor v Dickens* [1998] 3 FCR 455, [1998] 1 FLR 806 (not sufficient for a person to believe that he is going to be given a right over another's property if he knows that the other person has reserved the right to change his mind; the first person must also show that the other has created or encouraged a belief on his part that the other will not exercise that right). As to the quality of the assurances see also PARA 1090 ante.

9 *Lloyd v Dugdale* [2001] EWCA Civ 1754 at [35], [2002] 2 P & CR 167, [2001] All ER (D) 306 (Nov) per Sir Christopher Slade.

## UPDATE

### 1091 Unconscionability

NOTE 2--See also *Cobbe v Yeomans Row Management Ltd*; and PARA 1090 NOTE 9.

NOTE 5--*Gillet*, cited, applied: *Murphy v Burrows* [2004] EWHC 1900 (Ch), (2004) 7 ITELR 116 (not unconscionable for deceased to amend will after break down in relationship). See also *Wormall v Wormall* [2004] All ER (D) 398 (Nov), CA.



Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/ (4) PROPRIETARY ESTOPPEL/1092. Appropriate relief.

### 1092. Appropriate relief.

The court has a very wide discretion in satisfying an equity arising under the doctrine of proprietary estoppel<sup>1</sup>. The court cannot, however, exercise a completely unfettered discretion according to the individual judge's notion of what is fair in any particular case<sup>2</sup>. In the majority of cases the courts have satisfied the equity raised by estoppel by meeting the claimant's expectations, that is by granting him what he was promised or its monetary equivalent. The relief granted may therefore take a variety of forms; for example, requiring repayment of the money laid out in reliance on the promisor's assurances<sup>3</sup>; refusing to the true owner an order for possession, in effect granting a licence to the promisee to occupy the premises<sup>4</sup>; granting to the person who expended the money a charge or lien on the property or the proceeds of its sale<sup>5</sup>; finding a constructive trust<sup>6</sup>; granting an absolute interest in the property<sup>7</sup>; granting an easement where a right of access had been promised<sup>8</sup>; or, where a promise had been made that a specific property would be left to the promisee as an inheritance and that property was later sold and another property substituted, requiring payment of the proceeds of sale of the substituted property to the promisee<sup>9</sup>.

The process of granting relief has been described as finding the minimum equity to do justice to the claimant<sup>10</sup>; the dictum comes from a case where the award exceeded the claimant's expectations<sup>11</sup>, and does not seem to imply any reluctance to meet those expectations<sup>12</sup>. However, recent authority warns against the adoption of any summary formula<sup>13</sup> and emphasises that the award must be proportionate to the detriment suffered<sup>14</sup>. In the decided cases where the relief given has not met the claimant's expectations, the reasons have included the fact that the representee has only claimed reliance loss<sup>15</sup>; that there was no appropriate legal mechanism for awarding expectation loss<sup>16</sup>; and that the reliance loss was small in proportion to the claimant's expectations<sup>17</sup>. Factors such as the conduct of the parties<sup>18</sup> or their relative needs<sup>19</sup> may also influence the court to grant other measures of relief.

1 See eg *Campbell v Griffin* [2001] EWCA Civ 990 at [36], 82 P & CR D43, [2001] All ER (D) 294 (Jun) per Robert Walker LJ; *JS Bloor (Measham) Ltd v Calcott* [2002] 1 EGLR 1, [2002] 09 EG 222.

2 *Jennings v Rice* [2002] EWCA Civ 159 at [43], [2003] 1 P & CR 100, [2003] 1 FCR 501 per Robert Walker LJ.

3 *Neesom v Clarkson* (1845) 4 Hare 97 at 101; and see *Davey v Durrant* (1857) 1 De G & J 535 at 554-555; *Plimmer v City of Wellington Corpn* (1884) 9 App Cas 699, PC; cf *Claverings Case* (prior to 1800), cited in *Jackson v Cator* (1800) 5 Ves 688 at 690.

4 *Ramsden v Dyson and Thornton* (1866) LR 1 HL 129 at 171 per Lord Kingsdown; *Inwards v Baker* [1965] 2 QB 29, [1965] 1 All ER 446, CA; *Siew Soon Wah (alias Siew Pooi Yong) v Yong Tong Hong* [1973] AC 836, PC; and see *Parker v Parker* [2003] EWHC 1846 (Ch), [2003] All ER (D) 421 (Jul) (claimant's legal status was as licensee under licence terminable by not less than two years' notice).

5 *Unity Joint Stock Mutual Banking Association v King* (1858) 25 Beav 72 at 77-78; *Chalmers v Pardoe* [1963] 3 All ER 552, [1963] 1 WLR 677, PC; *Dodsworth v Dodsworth* (1973) 228 Estates Gazette 1115, CA; *Griffiths v Williams* (1977) 248 Estates Gazette 947, CA; *Maharaj v Chand* [1986] AC 898, [1986] 3 All ER 107, PC, distinguishing *Chalmers v Pardoe* supra; *Campbell v Griffin* [2001] EWCA Civ 990 at [36], 82 P & CR D43, [2001] All ER (D) 294 (Jun); and see LIEN. See also *Baker v Baker* (1993) 25 HLR 408, CA (claimant, who had lost not whole of sum contributed by him to purchase a house but merely the right to rent-free occupation for the rest of his life, entitled to sum commensurate with extent of his equity).

6 *Hussey v Palmer* [1972] 3 All ER 744, [1972] 1 WLR 1286, CA; but see *Haslemere Estates Ltd v Baker* [1982] 3 All ER 525, [1982] 1 WLR 1109.

7 See eg *Pascoe v Turner* [1979] 2 All ER 945, [1979] 1 WLR 431, CA.

8 *Crabb v Arun District Council* [1976] Ch 179, [1975] 3 All ER 865, CA.

9 *Wayling v Jones* (1993) 69 P & CR 170, [1996] 2 FCR 41, CA.

10 *Crabb v Arun District Council* [1976] Ch 179 at 198, [1975] 3 All ER 865 at 880, CA, per Scarman LJ.

11 The claimant's expectation is normally the maximum extent of the relief given: *Watson v Goldsbrough* [1986] 1 EGLR 265, CA.

12 See eg *Wayling v Jones* (1993) 69 P & CR 170, [1996] 2 FCR 41, CA; *Walton v Walton* (14 April 1994, unreported), CA; and cf *Regalian Properties plc v London Docklands Development Corp*n [1995] 1 All ER 1005 at 1020-1021, [1995] 1 WLR 212 at 227 per Rattee J. Contrast the position elsewhere in the Commonwealth where there is a greater readiness to grant relief which meets the claimant's reliance loss rather than his full expectation: see A Robertson 'The Statute of Frauds, Equitable Estoppel and the Need for "Something More"' (2003) 19 JCL 273.

13 *Jennings v Rice* [2002] EWCA Civ 159 at [44], [2003] 1 P & CR 100, [2003] 1 FCR 501 per Robert Walker LJ.

14 See *Jennings v Rice* [2002] EWCA Civ 159 at [36]-[38], [2003] 1 P & CR 100, [2003] 1 FCR 501 per Aldous LJ and at [44]-[56] per Robert Walker LJ. See also *Sledmore v Dalby* (1996) 72 P & CR 196, CA; *Campbell v Griffin* [2001] EWCA Civ 990, 82 P & CR D43, [2001] All ER (D) 294 (Jun). For a fuller discussion of remedies see E Cooke 'Estoppel and the Protection of Expectations' [1997] 17 LS 258 and Simon Gardner 'The Remedial Discretion in Proprietary Estoppel' (1999) 115 LQR 438, both referred to with approval by Robert Walker LJ in *Jennings v Rice* supra at [42].

15 See eg *Hussey v Palmer* [1972] 3 All ER 744, [1972] 1 WLR 1286, CA.

16 See *Dodsworth v Dodsworth* (1973) 228 Estates Gazette 1115, [1973] EGD 233, CA (defendants to possession proceedings asserted an equity to remain in the property after the owner's death; court took the view that to grant the right of occupation would have resulted in the occupants becoming tenants for life under the Settled Land Act 1925, which would have given them a far greater interest than they had expected. Since the coming into force of the Trusts of Land and Appointment of Trustees Act 1996, that problem would no longer arise on similar facts: see PARA 1041 ante). See also *Burrows v Burrows and Sharp* [1991] Fam Law 67, 23 HLR 82, CA (judge's order that appellant held house on trust for sale for herself for life with remainder to respondents as beneficial joint tenants absolutely, and that both appellant and respondents had a right to reside there, unworkable in view of relations between the parties).

17 See eg *Burrows v Burrows and Sharp* [1991] Fam Law 67, 23 HLR 82, CA, where the relatively modest expenditure by the respondents, who had failed to keep up the mortgage payments on the property, was one reason for overturning the judge's order granting them proprietary rights; and see note 16 supra.

18 See eg *Baker v Baker* [1993] 2 FLR 247, [1993] Fam Law 475, CA.

19 See *Sledmore v Dalby* (1996) 72 P & CR 196, CA (respondent had lived rent free in the house for 18 years; he was now in employment and therefore capable of paying for his own accommodation; in contrast, the appellant was in a vulnerable position in that she was liable to lose her accommodation and there was a pressing need for her to regain the house which was her property. The respondent had clearly assumed that he would be allowed to stay in the house for the rest of his life, rent free, but in the circumstances he had to be content with something less than his expectations since the position of the appellant and her needs had to be balanced against the present use of the premises made by the respondent and his present need for them).

## UPDATE

### 1092 Appropriate relief

NOTE 1--Where the evidence submitted by a party would support a claim of proprietary estoppel but the estoppel has not been specifically pleaded, relief based on the estoppel may nonetheless be granted: *Strover v Strover* [2005] EWHC 860 (Ch), [2005] All ER (D) 115 (May).

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/ (4) PROPRIETARY ESTOPPEL/1093. Interaction with land registration.

### 1093. Interaction with land registration.

The doctrine of proprietary estoppel operates to give the promisee a proprietary interest in the land in two stages; first the circumstances occur which generate an equity in his favour and then the court decides the appropriate award in order to give effect to that equity. There has been some controversy as to the status of the equity, which has often been described as inchoate, between the first and second of these stages<sup>1</sup>. Where title to the land is unregistered, the equity is binding on a purchaser of the affected land who has notice<sup>2</sup> and also on a donee, even without notice<sup>3</sup>; but the position with regard to registered land was less clear<sup>4</sup>. The Land Registration Act 2002 now declares that, for the avoidance of doubt, in relation to registered land an equity by estoppel has effect from the time the equity arises as an interest capable of binding successors in title, subject to the rules<sup>5</sup> about the effect of dispositions on priority<sup>6</sup>.

1 The analysis in the text is based on that given by a joint working group of the Law Commission and HM Land Registry in *Land Registration for the Twenty-First Century, a Consultative Document* (Law Com no 254) (1998) PARA 3.35.

2 *Inwards v Baker* [1965] 2 QB 29 at 37, [1965] 1 All ER 446 at 449, CA, per Lord Denning MR; *ER Ives Investment Ltd v High* [1967] 2 QB 379, [1967] 1 All ER 504, CA. See also *Lloyds Bank plc v Carrick* [1996] 4 All ER 630 at 642, 73 P & CR 314 at 325-326, CA, per Morritt LJ.

3 *Voyce v Voyce* (1991) 62 P & CR 290 at 294, 296, CA.

4 See *Land Registration for the Twenty-First Century, a Consultative Document* (Law Com no 254) (1998) PARAS 3.35-3.36. See also *Lloyd v Dugdale* [2001] EWCA Civ 1754 at [43], [2002] 2 P & CR 167, [2001] All ER (D) 306 (Nov) (a decision under the Land Registration Act 1925 s 70(1)(g) (repealed)).

5 The rules referred to in the text are the rules contained in the Land Registration Act 2002 ss 28-31: see LAND REGISTRATION.

6 *Ibid* s 116. The Law Commission has expressed the view that this provision is declaratory only and does not effect a change in the law: see *Land Registration for the Twenty-First Century, a Conveyancing Revolution* (Law Com no 271) (2001) PARAS 5.30-5.31.

Such an equity is an interest which may override first registration where the person having the benefit of it is in actual occupation (Land Registration Act 2002 ss 11, 12, Sch 1 para 2) and may also, where the person having that benefit is in such occupation, override a registered disposition unless (1) inquiry was made of him before the disposition and he failed to disclose the right when he could reasonably have been expected to do so; or (2) his occupation would not have been obvious on a reasonably careful inspection of the land at the time of the disposition and the person to whom the disposition is made does not have actual knowledge of the interest at that time (ss 29, 30, Sch 3 para 2). As to the meaning of 'actual occupation' see *Lloyd v Dugdale* [2001] EWCA Civ 1754 at [43], [2002] 2 P & CR 167, [2001] All ER (D) 306 (Nov) (a decision under the Land Registration Act 1925 s 70(1)(g) (repealed)). See further LAND REGISTRATION.

Halsbury's Laws of England/ESTOPPEL (VOLUME 16(2) (REISSUE))/5. ESTOPPEL BY REPRESENTATION/ (4) PROPRIETARY ESTOPPEL/1094. Proprietary estoppel and statute.

#### **1094. Proprietary estoppel and statute.**

Where the representation is a promise that the promisee will inherit property, proprietary estoppel may be used to give effect to the promise notwithstanding that the statutory formalities for making a testamentary disposition have not been complied with<sup>1</sup>. With regard to a promise to transfer an interest in land, the Law of Property (Miscellaneous Provisions) Act 1989 sets out the formalities required for a valid contract<sup>2</sup>. The relevant provisions do not, however, affect the creation or operation of resulting, implied or constructive trusts<sup>3</sup>; this statutory exception neither expressly saves the operation of the doctrine of proprietary estoppel nor expressly provides that it should have no application<sup>4</sup> and it has been suggested that the exception effectively excludes from the operation of the statutory requirements cases in which an interest in land might equally well be claimed by relying on constructive trust or on proprietary estoppel<sup>5</sup>.

The Land Registration Act 2002 lays down a statutory framework for the introduction of electronic conveyancing<sup>6</sup> and prescribes the necessary formalities<sup>7</sup>. A contract to make a disposition of registered land of a specified kind<sup>8</sup> will only have effect if it is made by means of a document in electronic form and if, when the document purports to take effect, it is electronically communicated to the registrar and the relevant registration requirements<sup>9</sup> are met<sup>10</sup>. There is no exception in the relevant provisions of the 2002 Act for the creation or operation of resulting, implied or constructive trusts corresponding to the exception in the 1989 Act discussed above. It is not known to what extent estoppel will be available when purported dispositions have not been made electronically in circumstances where they are required so to be made.

1 See eg *Re Basham* [1987] 1 All ER 405, [1986] 1 WLR 1498; *Gillett v Holt* [2001] Ch 210, [2000] 2 All ER 289, CA.

2 See the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (as amended); and SALE OF LAND vol 42 (Reissue) PARA 29 et seq.

3 See *ibid* s 2(5) (as amended); and SALE OF LAND vol 42 (Reissue) PARA 29.

4 *Yaxley v Gotts* [2000] Ch 162 at 181, [2000] 1 All ER 711 at 726, CA, per Clarke LJ.

5 *Yaxley v Gotts* [2000] Ch 162 at 193, [2000] 1 All ER 711 at 736, CA, per Beldam LJ. As to the overlap between the doctrines of constructive trust and proprietary estoppel in this area see PARA 1089 the text and note 16 ante. It was the view of the Law Commission that estoppel should be available to override the requirements of the Law of Property (Miscellaneous Provisions) Act 1989 s 2 (now as amended) as it had been to override the Law of Property Act 1925 s 40 (repealed): see *Formalities for Contracts for Sale etc of Land* (1987) (Law Com no 164) Pt V p 17 et seq, cited in *Yaxley v Gotts* supra at 188-191 and 732-734 per Beldam LJ; and see at 182 and 726 per Clarke LJ ('in my opinion the contents of that report will be of the greatest assistance in deciding whether or not the principles of particular types of estoppel should be held to be contrary to the public policy underlying the Act ... an attempt to apply the principles of proprietary estoppel might well succeed, depending upon the facts of the particular case.').

6 See the Land Registration Act 2002 Pt 8 (ss 91-95) (as amended); and LAND REGISTRATION.

7 See *ibid* ss 91, 93; and LAND REGISTRATION.

8 Ie a kind specified by rules: s 93(1).

9 As to the relevant registration requirements see *ibid* s 93(3).

10 See *ibid* s 93(1), (2).

## **UPDATE**

### **1094 Proprietary estoppel and statute**

NOTE 5--See, however, *Yeoman's Row Management Ltd v Cobbe* [2008] UKHL 55, [2008] 4 All ER 713. In an obiter statement, without direct reference to *Yaxley*, Lord Scott opined that the lack of an express exception in the Law of Property (Miscellaneous Provisions) Act 1989 s 2 for proprietary estoppel prevented it being relied on to enforce a disposition of land outside s 2. See also *Brightlingsea Haven Ltd v Morris* [2008] EWHC 1928 (QB), [2009] P & CR 169, [2008] All ER (D) 307 (Oct) (discrepancy between *Yaxley* and *Yeoman's Row* noted); and *Hutchison v B & DF Ltd* [2008] EWHC 2286 (Ch), [2008] All ER (D) 41 (Oct) (*Yeoman's Row* applied).

---- End of Request ----

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